

BEST AVAILABLE COPY

QUESTION PRESENTED

Does a court of appeals have jurisdiction under 28 U.S.C. § 1291 of an appeal by the Secretary of Health and Human Services of a district court's order remanding for further proceedings a case brought pursuant to 42 U.S.C. § 405(g) ?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
A. Mrs. Finkelstein's Applications for Benefits.....	1
B. Widow's Benefits Under the Social Security Act..	2
C. The SSA's Rejection of Mrs. Finkelstein's Claim..	3
D. The District Court's Remand of Mrs. Finkelstein's Case	3
E. The Court of Appeals' Dismissal for Lack of Appellate Jurisdiction.....	4
SUMMARY OF ARGUMENT	5
ARGUMENT	9
I. THE DISTRICT COURT'S REMAND ORDER WAS NOT A "FINAL DECISION" THAT CONCLUDED THE PROCEEDINGS.	11
A. The Secretary's Position Is Inconsistent With This Court's Jurisprudence, With Uniform Court of Appeals Decisions, and With the Secretary's Concessions.	11
B. The Secretary Misinterprets Section 405 (g) ...	16
1. Under <i>Sullivan v. Hudson</i> , a Section 405 (g) Remand Is Not a Final Decision...	17
2. The Proper Construction of Section 405 (g) Confirms That a Remand Is Not a Final Decision.	20

TABLE OF CONTENTS—Continued

	Page
3. Even if the Sentences of Section 405(g) May Be Read Separately, the District Court's Order Was a Remand Under the Sixth Sentence.	28
4. The Secretary's Proposal to Distinguish the Appealability of "Fourth Sentence Remands" From "Sixth Sentence Remands" Is Unsound in Terms of Administration of the Courts of Appeals.	30
II. AS THE COURT OF APPEALS HELD, THIS CASE DOES NOT WARRANT APPLICATION OF THE "NARROW EXCEPTION" TO THE FINAL JUDGMENT RULE FOR COLLATERAL ORDERS.	32
A. The District Court's Remand Order Is Not "Effectively Unreviewable."	36
1. The Secretary's Right to Appellate Review Is Not "Irretrievably Lost," Because the Claimant May Return to the District Court.	37
2. The Secretary May Return to the District Court Following His Decision on Remand.	38
B. The District Court's Remand Order Did Not Resolve "An Important Issue Completely Separate From the Merits of the Action."	40
1. The District Court Did Not Resolve an "Important Issue."	41
2. The Issue Is Not "Completely Separate From the Merits."	43
III. NO INSTITUTIONAL INTERESTS WOULD BE SERVED BY DISREGARDING THE RULE OF FINALITY IN THIS CASE.	44
A. The Secretary's Proposal Would Improperly Burden the Courts.	45

TABLE OF CONTENTS—Continued

	Page
B. The Secretary's Proposal Would Unfairly Burden Claimants.	46
C. Immediate Appellate Review Would Be Inefficient for the SSA.	47
IV. THE SECRETARY HAS AN ADEQUATE ABILITY TO OBTAIN REVIEW OF ISSUES HE DEEMS IMPORTANT.	48
CONCLUSION	50
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
<i>Abney v. United States</i> , 431 U.S. 651 (1977)	32, 43
<i>Aubeuf v. Schweiker</i> , 649 F.2d 107 (2d Cir. 1981) ..	29
<i>Avery v. Sec'y of HHS</i> , 762 F.2d 158 (1st Cir. 1985)	36
<i>Bachowski v. Usery</i> , 545 F.2d 363 (3d Cir. 1976) ..	49-50
<i>Badger-Powhatan v. United States</i> , 808 F.2d 823 (Fed. Cir. 1986)	50
<i>Barfield v. Weinberger</i> , 485 F.2d 696 (5th Cir. 1973)	14, 40, 50
<i>Beach v. Bowen</i> , 788 F.2d 1399 (8th Cir. 1986)	12, 13
<i>Bennett v. Sullivan</i> , No. 89-1748 (4th Cir. March 16, 1990)	48
<i>Biddle v. Heckler</i> , 721 F.2d 1321 (11th Cir. 1983) ..	14
<i>Board of Trustees v. Sweeney</i> , 439 U.S. 24 (1978) ..	45
<i>Bohms v. Gardner</i> , 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968)	12, 13, 29
<i>Brown v. Sec'y of HHS</i> , 747 F.2d 878 (3d Cir. 1984)	15, 19, 24, 39
<i>Brown v. Sullivan</i> , 724 F. Supp. 76 (W.D.N.Y. 1989)	49
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962)	34
<i>Budinich v. Becton Dickinson & Co.</i> , 486 U.S. 196 (1988)	19-20, 30
<i>Burlington N. Inc. v. United States</i> , 459 U.S. 131 (1982)	23
<i>Cabot Corp. v. United States</i> , 788 F.2d 1539 (Fed. Cir. 1986)	50
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	18
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	23, 36
<i>Carter v. Heckler</i> , 712 F.2d 137 (5th Cir. 1983)	29
<i>Cassas v. Sec'y of HHS</i> , 893 F.2d 454 (1st Cir. 1990)	3, 41, 48
<i>Catlin v. United States</i> , 324 U.S. 229 (1945)	7, 10, 11
<i>Caudill v. Sec'y of HHS</i> , 877 F.2d 62 (6th Cir. 1989) (Table, No. 89-3464)	14
<i>Central Ky. Natural Gas Co. v. Railroad Comm'n</i> , 290 U.S. 264 (1933)	21

TABLE OF AUTHORITIES—Continued

	Page
<i>Chastang v. Heckler</i> , 729 F.2d 701 (11th Cir. 1983)	14
<i>Chicago R.I. & Pac. Ry. v. Schendel</i> , 270 U.S. 611 (1926)	25
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949)	5-6, 10, 32, 43, 44
<i>Cohen v. Perales</i> , 412 F.2d 44 (5th Cir. 1969), rev'd sub nom. <i>Richardson v. Perales</i> , 402 U.S. 389 (1971)	42
<i>Colon v. Sec'y of HHS</i> , 877 F.2d 148 (1st Cir. 1989)	13, 14, 15, 49
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	passim
<i>Copeland v. Bowen</i> , 861 F.2d 536 (9th Cir. 1988) ..	15, 31, 40
<i>Crawford v. Haller</i> , 111 U.S. 796 (1884)	34
<i>Crowder v. Sullivan</i> , No. 89-2681 (7th Cir. March 5, 1990) (to be reported at 897 F.2d 252)	13
<i>Curtis v. Heckler</i> , 579 F. Supp. 1026 (E.D. Tex. 1984)	29
<i>Dalto v. Richardson</i> , 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971)	12, 13
<i>Deposit Guar. Nat'l Bank v. Roper</i> , 445 U.S. 326 (1980)	40
<i>Dickinson v. Petroleum Conversion Corp.</i> , 338 U.S. 507 (1950)	31
<i>Doughty v. Bowen</i> , 839 F.2d 644 (10th Cir. 1988) ..	13
<i>Enelow v. New York Life Ins. Co.</i> , 293 U.S. 379 (1935)	9
<i>Ettelson v. Metropolitan Life Ins. Co.</i> , 317 U.S. 188 (1942)	9
<i>Farr v. Heckler</i> , 729 F.2d 1426 (11th Cir. 1984) ..	12, 13, 44
<i>FCC v. National Citizens Comm. for Broadcast-ing</i> , 436 U.S. 775 (1978)	23
<i>FCC v. Pottsville Broadcasting Co.</i> , 309 U.S. 134 (1940)	21, 22, 23
<i>FPC v. Pacific Power & Light Co.</i> , 307 U.S. 156 (1939)	25

TABLE OF AUTHORITIES—Continued

	Page
<i>FTC v. Curtis Publishing Co.</i> , 260 U.S. 568 (1923) ..	21-22, 22
<i>FTC v. Standard Oil Co. of Cal.</i> , 449 U.S. 232 (1980) ..	33
<i>Firestone Tire & Rubber Co. v. Risjord</i> , 449 U.S. 368 (1981) ..	10, 32, 49
<i>Flanagan v. United States</i> , 465 U.S. 259 (1984) ..	9-10
<i>Ford Motor Co. v. NLRB</i> , 305 U.S. 364 (1939) ..	20
<i>Gilerist v. Schweiker</i> , 645 F.2d 818 (9th Cir. 1981) ..	12, 13
<i>Gulfstream Aerospace Corp. v. Mayacamas Corp.</i> , 485 U.S. 271 (1988) ..	9, 35, 36
<i>Guthrie v. Schweiker</i> , 718 F.2d 104 (4th Cir. 1983) ..	24
<i>Hamby v. Heckler</i> , 607 F. Supp. 331 (W.D.N.C. 1985) ..	49
<i>Harper v. Bowen</i> , 854 F.2d 678 (4th Cir. 1988) ..	13, 14, 44, 50
<i>Harrison v. PPG Indus.</i> , 446 U.S. 578 (1980) ..	21
<i>Hatcher v. Sec'y of HHS</i> , No. 88-2918 (4th Cir. October 6, 1989) ..	15, 40
<i>Haywood v. Bowen</i> , 862 F.2d 873 (5th Cir. 1988) (Table, No. 88-1280) ..	14
<i>Headlee v. Heckler</i> , 708 F. Supp. 1167 (D. Colo. 1987), <i>EAJA</i> award <i>aff'd</i> , 869 F.2d 548 (10th Cir.), <i>cert. denied</i> , 110 S. Ct. 507 (1989) ..	49
<i>Helstoski v. Meanor</i> , 442 U.S. 500 (1979) ..	11
<i>Howell v. Schweiker</i> , 699 F.2d 524 (11th Cir. 1983) ..	12, 13
<i>ICC v. Baird</i> , 194 U.S. 25 (1904) ..	25
<i>ICC v. Brotherhood of Locomotive Eng'rs</i> , 482 U.S. 270 (1987) ..	33-34
<i>ICC v. Clyde S.S. Co.</i> , 181 U.S. 29 (1901) ..	23
<i>International Prods. Corp. v. Koons</i> , 325 F.2d 403 (2d Cir. 1963) ..	36
<i>Jordan v. Heckler</i> , 721 F.2d 349 (11th Cir. 1983) ..	14
<i>Kier v. Sullivan</i> , 888 F.2d 244 (2d Cir. 1989) ..	<i>passim</i>
<i>Lauro Lines S.R.L. v. Chasser</i> , 109 S. Ct. 1976 (1989) ..	9, 37, 42

TABLE OF AUTHORITIES—Continued

	Page
<i>Lenz v. Sec'y of HHS</i> , 641 F. Supp. 144 (D.N.H. 1986) ..	39-40
<i>Liberty Mutual Ins. Co. v. Wetzel</i> , 424 U.S. 737 (1976) ..	11, 19, 28
<i>Marcus v. Bowen</i> , 696 F. Supp. 364 (N.D. Ill. 1988) ..	3
<i>McCoy v. Schweiker</i> , 683 F.2d 1138 (8th Cir. 1982) (en banc) ..	49, 50
<i>Mesa v. Sec'y of HHS</i> , No. 89-2024 (10th Cir. app. filed January 25, 1989) ..	48
<i>Messinger v. Anderson</i> , 225 U.S. 436 (1912) ..	41
<i>Midland Asphalt Corp. v. United States</i> , 109 S. Ct. 1494 (1989) ..	9, 37
<i>Miles v. Bowen</i> , 632 F. Supp. 282 (M.D. Ala. 1986) ..	39
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) ..	10, 43
<i>Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983) ..	10, 11, 32, 33
<i>Newpark Shipbuilding & Repair, Inc. v. Roundtree</i> , 723 F.2d 399 (5th Cir.) (en banc), <i>cert. denied</i> , 469 U.S. 818 (1984) ..	42
<i>Nixon v. Fitzgerald</i> , 457 U.S. 731 (1982) ..	10, 43
<i>Occidental Petroleum Corp. v. SEC</i> , 873 F.2d 325 (D.C. Cir. 1989) ..	12-13, 33
<i>Osterneck v. Ernst & Whinney</i> , 109 S. Ct. 987 (1989) ..	30
<i>Papazian v. Bowen</i> , 856 F.2d 1455 (9th Cir. 1988) ..	39
<i>Paulson v. Bowen</i> , 836 F.2d 1249 (9th Cir. 1988) ..	19
<i>Providence Hosp., Inc. v. Sec'y of HHS</i> , 798 F.2d 470 (6th Cir. 1986) (Table, No. 86-3325) ..	14
<i>Public Service Comm'n v. Havemeyer</i> , 296 U.S. 506 (1936) ..	21
<i>Reynolds v. Heckler</i> , 570 F. Supp. 1064 (D. Ariz. 1983) ..	29
<i>Richardson v. United States</i> , 468 U.S. 317 (1984) ..	10-11
<i>Richardson-Merrell, Inc. v. Koller</i> , 472 U.S. 424 (1985) ..	9, 37
<i>Rizzo v. Sec'y of HHS</i> , 708 F. Supp. 520 (W.D.N.Y. 1989) ..	49

TABLE OF AUTHORITIES—Continued

	Page
<i>Scripps-Howard Radio, Inc. v. FCC</i> , 316 U.S. 4 (1942)	23
<i>Seatrail Shipbuilding Corp. v. Shell Oil Co.</i> , 444 U.S. 572 (1980)	26, 33
<i>Southern Ry. v. St. Louis Hay & Grain Co.</i> , 214 U.S. 297 (1909)	20-21
<i>Stack v. Boyle</i> , 342 U.S. 1 (1951)	44
<i>Stringfellow v. Concerned Neighbors in Action</i> , 480 U.S. 370 (1987)	9, 15-16, 36
<i>Sullivan v. Everhart</i> , 110 S. Ct. 960 (1990)	35
<i>Sullivan v. Hudson</i> , 109 S. Ct. 2248 (1989)	<i>passim</i>
<i>Sullivan v. Zebley</i> , 110 S. Ct. 885 (1990)	3, 4, 48
<i>Swedberg v. Bowen</i> , 804 F.2d 432 (8th Cir. 1986) ..	19
<i>Switzerland Cheese Ass'n v. E. Horne's Market, Inc.</i> , 385 U.S. 23 (1966)	36
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 357 U.S. 320 (1958)	25
<i>Taylor v. Heckler</i> , 778 F.2d 674 (11th Cir. 1985) ..	42
<i>In re Tiffany</i> , 252 U.S. 32 (1920)	34
<i>Tolany v. Heckler</i> , 756 F.2d 268 (2d Cir. 1985) ..	3
<i>Tookes v. Harris</i> , No. 79-3340 (5th Cir. March 25, 1980) (reported as an appendix to <i>Howell v. Schweiker</i> , 699 F.2d 524, 527 (11th Cir. 1983)) ..	13, 14, 44, 49
<i>Torres v. Sec'y of HHS</i> , 677 F.2d 167 (1st Cir. 1982)	49
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	10, 33
<i>United States v. MacDonald</i> , 435 U.S. 850 (1978) ..	37
<i>United States v. Ryan</i> , 402 U.S. 530 (1971)	32, 36
<i>Vermont Yankee Nuclear Power Corp. v. NRDC</i> , 435 U.S. 519 (1978)	33-34
<i>Van Cauwenberghe v. Biard</i> , 486 U.S. 517 (1988) ..	<i>passim</i>
<i>Whitehead v. Califano</i> , 596 F.2d 1315 (6th Cir. 1979)	13, 14
<i>Willeford v. Sec'y of HHS</i> , 824 F.2d 771 (9th Cir. 1987)	3
<i>Wilson v. Heckler</i> , 609 F. Supp. 120 (W.D. Mo. 1985)	24

TABLE OF AUTHORITIES—Continued

Constitutional Provisions	Page
Article I, section 6 (Speech and Debate Clause) ..	11
Amend. 5 (Double Jeopardy Clause)	10-11, 43
 Statutes	
Act of July 1, 1930, to Amend Section 16 of the Radio Act of 1927, Pub. L. 71-494, 46 Stat. 844 ..	21
Administrative Procedure Act, 5 U.S.C. §§ 501 <i>et seq.</i>	18
All Writs Act, 28 U.S.C. § 1651	49
Classified Information Procedures Act, 18 U.S.C. App. §§ 1 <i>et seq.</i>	28
Comprehensive Crime Control Act of 1984, Title II (Bail Reform Act), 18 U.S.C. §§ 3141 <i>et seq.</i> ..	
18 U.S.C. § 3145(c)	28
Equal Access to Justice Act, 5 U.S.C. § 504 & 28 U.S.C. § 2412	17-20, 26, 27, 31, 40
28 U.S.C. § 2412(d)(1)	17
Expediting Act, 15 U.S.C. § 29	34
Federal Trade Commission Act, 15 U.S.C. §§ 41 <i>et seq.</i>	22
Hobbs Act, 28 U.S.C. §§ 2341 <i>et seq.</i>	34
28 U.S.C. § 2349(a)	23
28 U.S.C. § 2350	34
Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b)	7, 43, 49, 50
Interstate Commerce Act, 49 U.S.C. §§ 10101 <i>et seq.</i>	22
Judiciary Act of 1789, ch. 20, 1 Stat. 73	9
Judicial Code of 1948, as amended, Title 28, U.S.C. ..	
28 U.S.C. § 1254(1)	34
28 U.S.C. § 1257	34
28 U.S.C. § 1291	<i>passim</i>
28 U.S.C. § 1292	<i>passim</i>
28 U.S.C. § 1292(a)(1)	35, 36
28 U.S.C. § 1292(d)(1)	43, 50
28 U.S.C. § 2107	31, 47

TABLE OF AUTHORITIES—Continued

	Page
National Labor Relations Act, 29 U.S.C. §§ 151 <i>et seq.</i>	22
Omnibus Crime Control and Safe Streets Act of 1968, Title III (Wiretapping and Electronic Surveillance), 18 U.S.C. §§ 2510 <i>et seq.</i>	
18 U.S.C. § 2518(10) (b)	27-28
Radio Act of 1927, Pub. L. 69-632, 44 Stat. 1169....	21
Social Security Act, 42 U.S.C. §§ 301 <i>et seq.</i>	<i>passim</i>
42 U.S.C. § 402(e) (1)	2
42 U.S.C. § 402(e) (3) (A)	2
42 U.S.C. § 405(b) (1)	46
42 U.S.C. § 405(g)	<i>passim</i>
42 U.S.C. § 405(h)	18
42 U.S.C. § 405(i)	26
42 U.S.C. § 423(d) (2) (B)	2, 3
Social Security Amendments of 1983, Pub. L. 98-21, 97 Stat. 65	2
<i>Rules & Regulations</i>	
Fed. R. App. P. 4(a) (1)	47
Fed. R. Civ. P. 54(b).....	26, 33
Fed. R. Civ. P. 56(d).....	26
Fed. R. Civ. P. 59	19-20
20 C.F.R. Part 404, Subpart P, Appendix 1	2, 3, 4
20 C.F.R. § 404.905	46
20 C.F.R. § 404.909(a) (1)	46
20 C.F.R. § 404.929	46
20 C.F.R. § 404.967	46
20 C.F.R. § 404.1545	5
20 C.F.R. § 404.1577	3, 41
20 C.F.R. § 404.1578	2, 41
Final Rule Amending Regulations of the SSA Concerning ALJ Decisions on Remand, 54 Fed. Reg. 37,789 (1989).....	24
<i>Legislative and Administrative Materials</i>	
Annual Report of the Director of the Administrative Office of the United States Courts (1988) ..	47

TABLE OF AUTHORITIES—Continued

	Page
Deputy Comm'r of SSA for Programs, <i>Fiscal Year 1988 Report On Federal Court Decisions</i> (Nov. 3, 1988)	15, 30
Deputy Comm'r of SSA for Programs, <i>Fiscal Year 1989 Report On Federal Court Decisions</i> (Nov. 28, 1989)	15, 30
Div. of App. Assessment of the Off. of Policy & Procedures, SSA Off. of Hearings & Appas., <i>Court Remands: Analysis & Recommendations</i> (Dec. 1987)	30
H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939)	24
H.R. Rep. No. 100, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Admin. News 1277....	29
H.R. Rep. No. 120, 99th Cong., 1st Sess., reprinted in 1985 U.S. Code Cong. & Admin. News 132....	18, 27
S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939) ..	24
SSA 1989 <i>Annual Report to Congress</i>	15, 45
Subcomm. on Social Security of the House Comm. on Ways & Means, WMCP No. 72, 95th Cong., 2d Sess., <i>The Social Security Amendments of 1977; Brief Summary of Major Provisions and Detailed Comparison with Prior Law</i> (Comm. Print 1978)	26-27
U.S. Gen. Accounting Office, <i>Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals</i> (GAO/HRD-89-22 April 1989)	46
<i>Scholarly Authorities</i>	
42 Am. Jur. <i>Public Administrative Law</i> (1936)	22
2 Am. Jur. <i>2d Administrative Law</i> (1962)	25
P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, <i>Hart & Wechsler's The Federal Courts & the Federal System</i> (3d ed. 1988)	34-35
Davis, <i>To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?</i> , 25 A.B.A.J. 770 (1939)	22
Diller & Morawetz, <i>Intracircuit Nonacquiescence and a Breakdown of the Rule of Law: A Response to Estreicher & Revesz</i> , 99 Yale L.J. 801 (1990)	47

TABLE OF AUTHORITIES—Continued

	Page
Horgan, <i>The Impact of Interlocutory Judicial Decisions Upon Anti-Dumping and Countervailing Duty Proceedings</i> , 3 Fla. Int'l L.J. 167 (1988) ..	43
Hunter & McInerney, <i>What Happens When the Court Reverses a Dumping or Countervailing Duty Case? What Should Happen?</i> , 3 Fla. Int'l L.J. 151 (1988) ..	43
Kubitschek, <i>A Reevaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence</i> , 31 Ariz. L. Rev. 53 (1989) ..	42, 47
Ladimer, <i>Hearing & Review of Old-Age & Survivors Ins. Claims & Wage Record Cases by the Social Security Board</i> , 9 Geo. Wash. L. Rev. 58 (1940) ..	22
Layton, <i>Interlocutory Appeal of Remand Orders by the Court of International Trade Under 28 U.S.C. § 1292(d)(1)</i> , 3 Fla. Int'l L.J. 167 (1988) ..	43
J. Mashaw, et al., <i>Social Security Hearings & Appeals</i> (1978) ..	18, 41-42
J. Moore, J. Lucas & T. Currier, <i>Moore's Federal Practice</i> (2d ed. 1988) ..	41
Note, <i>Res Judicata in Administrative Law</i> , 49 Yale L.J. 1250 (1940) ..	25
Stason, <i>Methods of Judicial Relief from Administrative Action</i> , 24 A.B.A.J. 274 (1938) ..	22
D. Sweeney, J. Lyko & P. Martin, <i>Practice Manual for Social Security Claims</i> (1980 & Supp. 1983) ..	29
C. Wright, et al., <i>Federal Practice & Procedure</i> (1976, 1977 & Supp. 1990) ..	34, 35-36, 41-42, 45, 50

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-504

LOUIS W. SULLIVAN, SECRETARY
 OF HEALTH AND HUMAN SERVICES,
 v. *Petitioner,*

MARILYN FINKELSTEIN,
Respondent.

On Writ of Certiorari to the United States
 Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The court of appeals dismissed an appeal to it for lack of appellate jurisdiction because the district court's order remanding the case to the Secretary of Health and Human Services (the "Secretary") was not a final decision as required by 28 U.S.C. § 1291 (1982). For the reasons discussed below, the decision of the court of appeals should be affirmed.

A. Mrs. Finkelstein's Applications for Benefits

Marilyn Finkelstein is a fifty-nine year old widow suffering from heart disease. (Pet. App. 14a).¹ Her husband died on November 27, 1980, fully insured under the Social Security Act, 42 U.S.C. §§ 301 *et seq.* (Stipulation of Facts ¶ 1 (filed 10/1/85); Pet. App. 14a). She filed an application for benefits with the Social Security Administration (the "SSA") on October 19, 1981 and was awarded widow's disability benefits for her heart dis-

¹ "Pet. App." refers to the Secretary's Appendices to his Petition for a Writ of Certiorari. The Secretary's Petition is cited as "Pet."; his Brief on the Merits is cited as "Br."

ease, pursuant to 42 U.S.C. § 423(d)(2)(B) (1982 & Supp. I 1983). (Stipulation of Facts ¶ 2 (filed 10/1/85)). However, when she remarried on December 5, 1982, she became ineligible for benefits, pursuant to the then-effective provision of the Social Security Act disallowing widow's benefits upon remarriage, 42 U.S.C. § 402(e)(1) (1982). (*Id.*).

In 1983, Congress amended the Social Security Act to allow payment of disability benefits to previously entitled widows who remarried after age fifty. Social Security Amendments of 1983, Pub. L. 98-21 § 131(a), 97 Stat. 65, 92 (codified at 42 U.S.C. § 402(e)(3)(A) (Supp. I 1983)). Mrs. Finkelstein again was eligible for benefits, and on November 25, 1983—more than six years ago—she reapplied to the SSA for the disability benefits she previously had been receiving. (Stipulation of Facts ¶¶ 1, 2 (filed 10/1/85)). It is that application that is the subject of this case.

B. Widow's Benefits Under the Social Security Act

Under the Social Security Act, a widow may not obtain disability benefits unless she has a physical or mental impairment "of a level of severity which under regulations prescribed by the Secretary is deemed to be sufficient to preclude an individual from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B).

The SSA determines that a widow is disabled when her impairment or combination of impairments "has specific clinical findings that are the same as those for any impairment in the Listing of Impairments in Appendix 1 [to Subpart P of 20 C.F.R. Part 404] or medically equivalent to those for any impairment shown there." 20 C.F.R. § 404.1578 (1989). In determining whether a widow is entitled to benefits, the SSA evaluates her disability solely with reference to the Listing of Impairments. It does not make an individualized analysis of the functional consequences of the impairment on the claimant (the impairment's "functional impact"), despite express court of appeals holdings to the contrary.²

C. The SSA's Rejection of Mrs. Finkelstein's Claim

Mrs. Finkelstein's application for reinstatement of her benefits was denied initially and again upon reconsideration on March 28, 1984. (Pet. App. 14a). On September 28, 1984 (almost three years after Mrs. Finkelstein was initially found sufficiently disabled to receive benefits), an Administrative Law Judge ("ALJ") found, after a hearing, that Mrs. Finkelstein's heart disease did not make her a "disabled widow within the meaning of the Social Security Act." (*Id.*).

The ALJ rejected Mrs. Finkelstein's claim for benefits solely because he found that the evidence did not establish that her clinical findings were "equivalent" to those for ischemic heart disease, one of the cardiovascular impairments listed in the Listing of Impairments. (Pet. App. 16a). The ALJ did not make any findings as to whether Mrs. Finkelstein's impairment is "of a level of severity to prevent a person from doing any gainful activity," the ultimate determination required under 42 U.S.C. § 423(d)(2)(B) and 20 C.F.R. § 404.1577 (1989). (Pet. App. 17a). The ALJ's decision denying benefits to Mrs. Finkelstein became the final decision of the Secretary when the Appeals Council denied Mrs. Finkelstein's request for review on December 11, 1984. (Pet. App. 14a).

D. The District Court's Remand of Mrs. Finkelstein's Case

Mrs. Finkelstein sought review of the Secretary's decision in the United States District Court for the District of New Jersey, pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (1982). (Pet. App. 13a). The district court correctly observed that it is required by Section 405(g) to uphold the ALJ's decision "if after review of the record, there is substantial evi-

² *Cassas v. Sec'y of HHS*, 893 F.2d 454, 458-59 (1st Cir. 1990); *Kier v. Sullivan*, 888 F.2d 244, 247 (2d Cir. 1989); see also *Willeford v. Sec'y of HHS*, 824 F.2d 771, 774 (9th Cir. 1987) (Kennedy, J.); *Tolany v. Heckler*, 756 F.2d 268, 271 (2d Cir. 1985); *Marcus v. Bowen*, 696 F. Supp. 364, 379-80 (N.D. Ill. 1988); cf. *Sullivan v. Zebley*, 110 S. Ct. 885, 896-97 (1990) (functional impact must be considered in children's disability cases).

dence supporting the decision.” (*Id.*). The court noted that the ALJ properly “made clear on the record his reasons” for finding that Mrs. Finkelstein did not suffer from an impairment or combination of impairments which was the equivalent of one of the Secretary’s Listed Impairments. (Pet. App. 16a).

However, the record was “devoid of any findings regarding the functional impact” of Mrs. Finkelstein’s heart disease. (Pet. App. 17a). The district court held that “further proceedings” were therefore necessary in order for the SSA “to inquire whether the plaintiff may or may not engage in any gainful activity, as contemplated by the [Social Security] Act.” (Pet. App. 18a).³ The district court therefore remanded the case “for good cause shown.” (Pet. App. 25a). In doing so, the district court did not “uphold” or “affirm” the Secretary’s decision in any respect.

E. The Court of Appeals’ Dismissal for Lack of Appellate Jurisdiction

The SSA did not conduct the further proceedings on remand ordered by the district court so that a final determination of Mrs. Finkelstein’s application (which by then had been pending for more than four years) could be made. Instead, the Secretary attempted to appeal the district court’s remand order, contending that the statute

³ By disregarding the functional impact of Mrs. Finkelstein’s impairments, the SSA failed to assess whether she suffers from impairments that are just as disabling as a Listed Impairment even though they may not meet the precise requirements of any single Listing. Thus, the SSA did not determine whether her impairments are of the level of severity determined to preclude performance of any gainful activity—which is the statutory test. See cases cited p. 3 n.2, *supra*. As the Court held in *Sullivan v. Zebley*, 110 S. Ct. at 896, in the context of children’s disability benefits, the SSA’s method of determining whether an impairment or combination of impairments “meets or equals” a Listed Impairment is not an accurate measure of severity: “[n]o decision process restricted to comparing claimants’ medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof . . .”

and applicable regulations require him to look only to whether a claimant’s clinical findings meet or equal those of an impairment listed in the Listing of Impairments without regard to the individual functional impact of the claimant’s impairment or an examination of her “residual functional capacity.” (Pet. App. 2a-3a; 869 F.2d 215, 216-17). See 20 C.F.R. § 404.1545 (1989) (defining residual functional capacity for wage earners, but not functional impact).

The court of appeals dismissed the appeal for lack of appellate jurisdiction. (Pet. App. 19a-20a; 869 F.2d at 220). The court observed that remands to administrative agencies are not ordinarily appealable under 28 U.S.C. § 1291 because a remand order is “typically an interlocutory step in the adjudicative process and, therefore, not a final order.” (Pet. App. 4a; 869 F.2d at 217). The court held that “[t]he particular district [court] order” was “interlocutory, not final,” because the district court “ordered consideration of an additional factor before final administrative adjudication of the benefit issue.” (Pet. App. 12a; 869 F.2d at 220). With respect to the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (“*Cohen v. Beneficial*”), the court also held inapplicable the “narrow exception to the normal rule of non-appealability . . . limited to cases in which an important legal issue is finally resolved and review of that issue would be foreclosed ‘as a practical matter’ if an immediate appeal were unavailable.” (Pet. App. 4a-5a; 869 F.2d at 217). The court of appeals subsequently denied the Secretary’s petition for rehearing and also denied rehearing *in banc*. (Pet. App. 21a; 869 F.2d at 220-21).

SUMMARY OF ARGUMENT

The Secretary seeks to have this Court virtually rewrite Section 405(g) and recast the established law on finality under Section 1291 so that clearly interlocutory district court remands will be termed “final decisions” under Section 1291. The Secretary alternatively suggests that he be given a special application of the *Cohen v.*

Beneficial collateral order doctrine that would permit him immediately to appeal a district court remand before completion of a case. The Secretary thus invites this Court to disavow the interpretation of Section 405(g) set forth last Term in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), and to stretch beyond recognition the well-contoured narrow exception to the rule of finality under Section 1291. This Court should decline the invitation.

A. The Secretary's proposal would be destructive of the policies underlying the carefully developed law of appellate jurisdiction and would serve no compensating public purpose. It would instead unduly burden the courts of appeals by making piecemeal appellate adjudication of administrative proceedings routine, would work considerable inequity on applicants for Social Security disability benefits, and would likely increase the institutional burdens of the SSA.

B. Moreover, there is no need to accept the Secretary's short-sighted invitation. Underlying his argument is the fallacy that he has no convenient way to obtain appellate consideration of remands involving issues he deems important, within the confines of the current law of appellate jurisdiction. The Secretary is wrong; he has at least five convenient methods. *First*, the Social Security claimant, if dissatisfied after the decision on remand, may return to the district court. The Secretary may then obtain appellate review of the issue that initially prompted the district court to remand. This is precisely what occurred only a few months ago in another widow's disability benefits case, which held that functional impact must be considered. *Kier v. Sullivan*, 888 F.2d at 247. See pp. 37-38, *infra*.

Second, the judicial review mechanism set forth in Section 405(g) permits the Secretary, after the proceedings on remand, to return to the district court for entry of a final decision, after which he can take an appeal. The procedure set forth in Section 405(g) provides that after remand the Secretary may file with the district court his new decision granting or refusing benefits, and

can then engage in further substantive proceedings. The statute contemplates such a return, and the courts have required it. In fact, the Secretary has conceded that the district court retains jurisdiction to review any determination rendered on remand (see p. 14, *infra*), and that returning to the district court (even after an award of benefits) is "appropriate" (Br. at 44 n.35). He may then take an appeal from the final decision of the district court, including any issues involved in the original remand order.

Third, the sheer number of cases the Secretary litigates assures that he is able to obtain appellate review of issues he deems important after final determinations of claimants' applications by the district courts. Indeed, four circuits have decided or are now considering the precise issue he purported to appeal in this case, and it has been available for review from final decisions by numerous district courts across the country. See pp. 48-49 & n.44, *infra*.

Fourth, in the appropriate case, the Secretary may seek discretionary review pursuant to 28 U.S.C. § 1292 (b) (Supp. II 1984), the congressionally endorsed mechanism for immediate review of otherwise unreviewable interlocutory orders; and, *fifth*, in exceptional circumstances, the Secretary may seek a writ of mandamus in the court of appeals.

C. In order to support his request for special application of the finality rules, the Secretary advances "alternative theories" (Pet. at 15, 19) that lack any grounding in legal precedent, policy or logic and are inconsistent with the Secretary's prior interpretations of Section 405(g). The Secretary initially claims that a district court's remand "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). This argument, however, misconceives the nature of a final decision because it fails to focus on the remaining steps to be taken before conclusion of the litigation. The Secretary never addresses the fundamental

point that neither he nor Mrs. Finkelstein has yet received a decision by the court whether she is entitled to the benefits she sought by bringing suit.

The Secretary seeks to circumvent the general rule that a district court remand is not a final judgment with a novel interpretation of Section 405(g) that, if accepted, would require analyzing the nature of every remand for purposes of appealability. The Secretary's reading violates the plain language of the statute, as well as congressional intent. The proper reading of Section 405(g) confirms that a district court remand is not a final decision, and that appealability does not depend on an analysis of the nature of each remand. Moreover, the Secretary's theory is precluded by this Court's decision last Term in *Hudson*, in which the Court recognized that a final judgment is not reached until *after* the completion of the proceedings on remand. 109 S. Ct. at 2255. Furthermore, administration of the Secretary's first theory would be impractical, requiring a case-by-case determination in the courts of appeals of the proper categorization of every district court remand to the Secretary (some five to fifteen thousand per year).

D. The Secretary's second "theory"—that the district court's order was an appealable collateral order—fails under the requirements set forth in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), and cases following it. As discussed above, the district court's order is not "unreviewable on appeal from a final judgment." *Id.* Moreover, the district court did not resolve "an important issue completely separate from the merits," *id.* (the Secretary has conceded the latter, Pet. at 16 n.9). The district court's decision is not of national importance, particularly because, under the SSA's longstanding policy, district court rulings control only the particular application for benefits and not subsequent cases.

The Secretary's invitation would upset the carefully developed scheme established by Congress for appeals from final decisions as of right under Section 1291 and appeals from interlocutory decisions under the conditions

specified in Section 1292—a balance zealously guarded by this Court in a multitude of contexts.

ARGUMENT

The final judgment rule has been a statutory prerequisite to appellate review since the First Congress passed the Judiciary Act of 1789, ch. 20 §§ 21, 22, 25, 1 Stat. 73, 83-85. Congress has presently vested the courts of appeals with jurisdiction under 28 U.S.C. § 1291, which provides, in pertinent part, that "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States," and under 28 U.S.C. § 1292 (1982 & Supp. II 1984), which provides for appellate jurisdiction over interlocutory district court decisions in certain expressly articulated exceptions to the general requirement of finality.

In the years since its watershed opinion in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), this Court has steadily confined the ability of a dissatisfied litigant immediately to appeal an interlocutory district court order under Section 1291.⁴ Generally, no litigant may appeal

⁴ District court orders in all of the following cases have been held not immediately appealable under Section 1291: *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. 1976, 1980 (1989) (order denying motion to dismiss on basis of contractual forum selection clause); *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494, 1498 (1989) (order denying motion to dismiss indictment for alleged violation of grand jury secrecy rule); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (order denying motion to dismiss on ground of *forum non conveniens*; and order denying motion to dismiss on ground that internationally extradited defendant is immune from civil process); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 290 (1988) (order denying motion to stay or dismiss action pending resolution of state court suit raising same issues) (overruling *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942), and *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935)); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987) (order granting permissive intervention, but denying intervention as of right); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985) (order disqualifying counsel in a civil action); *Flanagan v. United States*, 465 U.S. 259, 267 (1984) (order disqualifying counsel in a criminal ac-

until the district court has made a decision that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Van Cauwenberghe v. Biard*, 486 U.S. at 521 (quoting *Catlin v. United States*, 324 U.S. at 233). Since the decision in *Coopers & Lybrand*, this Court has consistently given the final judgment rule a narrow interpretation.³ Despite the wide variety of hardships claimed by would-be appellants from the denial of immediate review, the Court has steadfastly “permit[ted] departures from the rule of finality in only a limited category of cases falling within the ‘collateral order’ exception delineated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949).” *United States v. Hollywood Motor Car Co.*, 458 U.S. at 265 (emphasis added).⁴

tion); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (order denying motion to dismiss based on prosecutorial vindictiveness); *Firestone Tire & Rubber Co. v. Rixford*, 449 U.S. 368, 377 (1981) (order denying motion to disqualify counsel in a civil action); *Coopers & Lybrand v. Livesay*, 437 U.S. at 469 (order determining that an action may not be maintained as a class action).

³ We have found only one case since *Coopers & Lybrand* in which the Court has held an arguably non-final order to be final. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (order staying federal action pending resolution of state court suit is a final decision where the stay “amounts to a dismissal of the suit”).

⁴ In the collateral order area, the Court has been especially protective of the integrity of the final judgment rule, preserving the narrow scope of the exception. In contrast to the many cases denying appellate review under the collateral order doctrine (pp. 9-10 n.4, *supra*), in only a handful of cases has the Court found orders that satisfy all of the Court’s “collateral order” requirements. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (denial of motion to dismiss by the Attorney General of the United States on grounds of immunity from suit); *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982) (same by President of the United States); *Richardson v. United States*, 468 U.S. 317, 321 (1984) (denial of criminal defendant’s motion to avoid exposure to double jeopardy as guaranteed by the Fifth Amendment to the United States

I. THE DISTRICT COURT’S REMAND ORDER WAS NOT A “FINAL DECISION” THAT CONCLUDED THE PROCEEDINGS.

The Secretary’s first “theory”—that the district court’s remand order to the Secretary was a “final decision” within the meaning of Section 1291 “in the usual sense of concluding the judicial proceedings” (Pet. at 20)—is contrary to well-settled jurisprudence under Section 1291 and is based on a misinterpretation of Section 405(g).

A. The Secretary’s Position Is Inconsistent With This Court’s Jurisprudence, With Uniform Court of Appeals Decisions, and With the Secretary’s Concessions.

As the court of appeals held, the district court’s order in this case was a typical interlocutory remand, requiring the “consideration [by the Secretary] of an additional factor before final administrative adjudication” could take place. (Pet. App. 12a; 869 F.2d at 220). It was merely a step in the process of deciding the claim. The remand clearly does not meet this Court’s definition of a final decision under Section 1291: “a decision by the district court that ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Van Cauwenberghe v. Biard*, 486 U.S. at 521-22 (quoting *Catlin v. United States*, 324 U.S. at 233). Put another way, Mrs. Finkelstein has “received none of the relief” she sought by bringing suit. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976). As this Court explained last Term, a Social Security claimant who has won a remand is in a situation “for all intents and purposes identical” to that of a litigant who, having won a reversal of a directed verdict, must still proceed to the conclusion of the litigation. Neither has

Constitution); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. at 11-12 (alternative holdings under final judgment rule and collateral order doctrine); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (denial of a motion to dismiss by former member of Congress on the ground that the Speech and Debate Clause of the United States Constitution prevents the action from being brought at all).

yet "achieve[d] [any] of the benefit sought in bringing the action." *Sullivan v. Hudson*, 109 S. Ct. at 2255.

The Secretary argues, however, that "the subject matter of the civil action . . . is not the plaintiff's underlying monetary claim for benefits under the Social Security Act, but rather the validity of the Secretary's final decision disposing of that claim." (Br. at 15-16). Under the Secretary's theory, claimants go to court not to obtain disability benefits, but to test—in some academic way—the "validity" of the Secretary's decision. This argument ignores reality: interlocutory rulings are often made on intertwined issues of law and fact; the presence of legal issues does not somehow transform the remand into a final decision. See 109 S. Ct. at 2254.

In examining whether a judgment is "final," the courts look to the proceedings that lie ahead in the litigation for all parties, not at the extent to which a ruling affronts or sets back the case of one of the parties. A litigation has either ended on the merits for all parties, or it has not. This case has not. The content of the judgment the district court will eventually execute after further proceedings have been completed is entirely unknown.⁷

Indeed, for more than twenty years, the Secretary has won dismissals of claimants' appeals of district court remand orders precisely because such orders do not end the litigation on the merits.⁸ If the litigation has not ended for a claimant, it cannot have ended for the Secretary. For this reason, the courts of appeals have "uniformly held that, as a general rule, a [district court's] remand order [to any administrative agency] is 'interlocutory' rather than 'final,' and thus may not be appealed imme-

⁷ The form of the district court's action confirms its substance. It entered an "Order," not a "Judgment." (Pet. App. 25a).

⁸ *Beach v. Bowen*, 788 F.2d 1399, 1401 (8th Cir. 1986); *Farr v. Heckler*, 729 F.2d 1426, 1427 (11th Cir. 1984); *Howell v. Schweiker*, 699 F.2d 524, 526 (11th Cir. 1983); *Gilchrist v. Schweiker*, 645 F.2d 818, 819 n.1 (9th Cir. 1981); *Dalto v. Richardson*, 434 F.2d 1018, 1019 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); *Bohms v. Gardner*, 381 F.2d 283, 285 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968).

diately (unless, of course, it is certified pursuant to § 1292)." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 329 (D.C. Cir. 1989) (collecting cases). This is the law in every circuit that has considered appeals from district court remands to the Secretary under Section 405(g); it is as true for appeals by the Secretary as it is for claimants' appeals.⁹

In one of the leading cases, Justice (then Circuit Judge) Blackmun explained why he agreed with the Secretary's argument that a district court remand pursuant to Section 405(g) is not a final decision under Section 1291:

The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be.

Bohms v. Gardner, 381 F.2d at 285.

The "uniformly held" principle that a remand does not meet the general requirement of finality is so well recognized that only last year the Secretary conceded "that, ordinarily, a remand order is not a final decision

⁹ *Colon v. Sec'y of HHS*, 877 F.2d 148, 151 (1st Cir. 1989); *Dalto v. Richardson*, 434 F.2d at 1019; *Finkelstein v. Bowen*, 869 F.2d 215, 217 (3d Cir. 1989) (Pet. App. 4a); *Harper v. Bowen*, 854 F.2d 678, 680 (4th Cir. 1988); *Tooken v. Harris*, No. 79-3340 (5th Cir. March 25, 1980) (reported as an appendix to *Howell v. Schweiker*, 699 F.2d at 527, 527); *Whitehead v. Califano*, 596 F.2d 1315, 1319 (6th Cir. 1979); *Crowder v. Sullivan*, No. 89-2681, slip op. at 1 (7th Cir. March 5, 1990) (to be reported at 897 F.2d 252); *Beach v. Bowen*, 788 F.2d at 1401; *Gilchrist v. Schweiker*, 645 F.2d at 819 n.1; *Doughty v. Bowen*, 839 F.2d 644, 645 (10th Cir. 1988); *Farr v. Heckler*, 729 F.2d at 1427. Although some of these cases found the collateral order exception applicable, we are aware of no case that has ever adopted the Secretary's current theory that a remand is a final order that ends the litigation on the merits.

of the district court, as that term is construed pursuant to 28 U.S.C. § 1291, and thus provides *no basis* for our assertion of jurisdiction." *Colon v. Sec'y of HHS*, 877 F.2d at 151 (emphasis added).¹⁰ The Secretary made a similar concession before this Court last Term:

The Secretary concedes that a remand order from a district court to the agency is *not* a final determination of the civil action and that the district court "retains jurisdiction to review *any* determination rendered on remand."

Sullivan v. Hudson, 109 S. Ct. at 2255 (quoting Brief for Petitioner at 16-17) (emphasis added).¹¹

¹⁰ The Secretary incorrectly asserts (Br. at 28 & n.21) that "the courts of appeals have, until quite recently, been unanimous in their view that the Secretary may appeal" a remand rejecting his legal conclusion. The courts of appeals have, in fact, repeatedly expressed their view for some time that the Secretary may not appeal a remand order and have dismissed such appeals by the Secretary. See, e.g., *Candill v. Sec'y of HHS*, 877 F.2d 62 (6th Cir. 1989) (Table, No. 89-3464); *Finkelstein v. Bowen*, 869 F.2d at 220 (3d Cir. 1989) (Pet. App. 12a); *Haywood v. Bowen*, 862 F.2d 873 (5th Cir. 1988) (Table, No. 88-1280); *Harper v. Bowen*, 854 F.2d at 680-51 (4th Cir. 1988); *Providence Hosp., Inc. v. Sec'y of HHS*, 798 F.2d 470 (6th Cir. 1986) (Table, No. 86-3325); *Biddle v. Heckler*, 721 F.2d 1321, 1321 (11th Cir. 1983); *Chastang v. Heckler*, 729 F.2d 701, 702 (11th Cir. 1983); *Jordan v. Heckler*, 721 F.2d 349, 349 (11th Cir. 1983); *Tooken v. Harris*, 699 F.2d at 529 (5th Cir. 1980); *Whitehead v. Califano*, 596 F.2d at 1319 (6th Cir. 1979); *Barfield v. Weinberger*, 485 F.2d 696, 698 (5th Cir. 1973). Although the Secretary acknowledges that several courts have dismissed his appeals from remands (Br. at 28-29, n.21), he does not cite *Barfield*, *Tooken*, *Chastang*, *Providence Hospital* or *Candill* at all, and cites *Whitehead* only in his Petition. In support of his position, the Secretary relies on cases allowing appeals under the collateral order exception; those cases cannot withstand scrutiny under *Coopers & Lybrand* and cases following it. See Part II, *infra*.

¹¹ This Term, the Secretary claims (Br. at 26, n.19) that those concessions were ambiguous and, in any event, were washed away by the new position stated in his Reply Brief in that case. Litigating against the Secretary is like litigating against Proteus, who eluded his captors by changing shape at the last moment. The Secretary has repeatedly advanced inconsistent positions on

Finally, the SSA itself does not consider remands to be "final decisions." Instead, in the SSA's reports to Congress, its tabulation of "final court decisions" *expressly* excludes remands. Nor does the SSA distinguish between "fourth sentence remands" and "sixth sentence remands."¹²

The reasons underlying the final judgment rule fully support its strict application here.

[T]he finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the final-

numerous issues relating to Section 405(g) including: (1) whether a remand ordered after the merits are reached is a final decision of the action (compare his concessions in *Hudson* above and before the courts of appeals in *Colon v. Sec'y of HHS*, 877 F.2d at 151, and *Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3d Cir. 1984) (discussed at p. 24, *infra*), with his disavowal of these concessions in this case (Br. at 26 n.19)); (2) whether a claimant may ever appeal a remand order (compare his consistent and successful position of more than 20 years that claimants may *not* appeal remand orders of any kind, *supra* at p. 12 n.8, with his statement in this case that these decisions "may well be" wrong (Br. at 21 n.17)); and (3) whether a legal issue decided in a remand order may be appealed upon final judgment after the remand proceedings (compare the Secretary's own appeal in *Kier v. Sullivan*, 888 F.2d 244 (2d Cir. 1989), discussed *infra* at 37-38, with his attempt to prevent claimants from doing just that in *Hatcher v. Sec'y of HHS*, No. 88-2918, slip op. at 7 (4th Cir. October 6, 1989), and *Copeland v. Bowen*, 861 F.2d 536 (9th Cir. 1988)). In light of the confusion the Secretary has sown, it is no wonder that the courts of appeals have not uniformly interpreted Section 405(g).

¹² SSA, 1989 Annual Report to Congress at 26, 34 Table 1 n.1; see Deputy Comm'r of SSA for Programs, *Fiscal Year 1989 Report on Federal Court Decisions* Table 3 (Nov. 28, 1989) ("Fiscal 1989 Report"); Deputy Comm'r of SSA for Programs, *Fiscal Year 1988 Report on Federal Court Decisions* Table 3 (Nov. 3, 1988) ("Fiscal 1988 Report").

ity doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference.

Stringfellow v. Concerned Neighbors in Action, 480 U.S. at 380. As we demonstrate below (see Part III, *infra*), the rule the Secretary proposes would exacerbate already intolerable delays caused to claimants, would further clog already overcrowded dockets in the courts of appeals, and would unduly interfere with the role of the district judges—who are “ground-level” participants in the adjudication of Social Security claims, *Sullivan v. Hudson*, 109 S. Ct. at 2254.

B. The Secretary Misinterprets Section 405(g).

Because it suits his purpose in this particular case, the Secretary attempts to circumvent the law under Section 1291 with a strained “interpretation” of Section 405(g). In doing so, the Secretary ignores the jurisprudence he has helped to create over the last twenty years, as well as the realities of district court review of SSA decisions.

The Secretary asserts that in this one subsection, 405(g), Congress has authorized the district courts to remand cases in two different ways with two radically differing consequences. He distinguishes between “fourth sentence remands” and “sixth sentence remands,” contending that different rules of appellate jurisdiction apply depending on which sentence is found to govern a particular remand. The Secretary claims that he can appeal a “fourth sentence remand,” while a “sixth sentence remand” is not appealable by either party. (Br. at 23). This argument makes no sense.

First, this interpretation, which was advanced by the Secretary last Term in *Sullivan v. Hudson*, see p. 26 n.21, *infra*, is precluded by that decision. In that case, the Court made no distinction among the sentences in Section 405(g) referring to remands, and instead made it clear that a district court remand to the SSA is not a final decision, 109 S. Ct. at 2254-56. Second, the Secretary’s

argument is based on a misreading of the plain language of Section 405(g) that entirely misconceives the purpose of that provision and violates the general congressional mandate in Sections 1291 and 1292. Third, assuming, *arguendo*, that the Secretary is correct that a “fourth sentence remand” can be identified and is immediately appealable, this order was not such a remand. Finally, adopting the Secretary’s proposal to distinguish among remands on a case-by-case basis would be impractical, generating a flood of litigation.

1. Under *Sullivan v. Hudson*, a Section 405(g) Remand Is Not a Final Decision.

Only last Term, this Court in *Sullivan v. Hudson*, 109 S. Ct. at 2254-56, made it clear that a district court remand to the SSA is not a final decision. In *Hudson*, the Court thoroughly examined when a plaintiff has “prevailed” and when “final judgment” is deemed entered in an action under Section 405(g), because the Equal Access to Justice Act (the “EAJA”) allows a litigant who is a “prevailing party” in a civil action against the federal government to recover fees in certain circumstances if the litigant applies for fees within thirty days of entry of final judgment. 28 U.S.C. § 2412(d)(1) (1982 & Supp. III 1985). The Court held that the SSA proceedings after remand by the district court are so intimately related to securing the relief sought by bringing the civil action that the court may award attorney’s fees under the EAJA to a claimant for representation during those proceedings. 109 S. Ct. at 2257-58. The appropriate time to apply for such fees is *after* the completion of the remand proceedings, not when the remand order is entered. *Id.* at 2255.

Not only did the Court in *Hudson* point out that a remand is not a “final judgment” under the EAJA, the Court squarely held that “the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a

part" *Id.* at 2256-57.¹³ The broad participation granted to the district courts by Section 405(g) places them "virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by ALJs and the Appeals Council" *Id.* at 2254 (quoting J. Mashaw, *et al.*, *Social Security Hearings and Appeals* 133 (1978)). The detailed provisions of Section 405(g) contemplate "the transfer of proceedings" back and forth between the courts and the SSA, "suggest[ing] a degree of direct interaction . . . alien to traditional review of agency action under the Administrative Procedure Act." *Id.*¹⁴ Because the district court "retains jurisdiction to review any determination rendered on remand" under Section 405(g), "there will often be no final judgment in a claimant's civil action for judicial review until the administrative proceedings on remand are complete." *Id.* at 2255. Thus, *Hudson* contemplates the Secretary's return to the district court for the entry of a final judgment and subsequent consideration of an EAJA fee application.

Moreover, the Court made no distinction among different kinds of remands. In fact, the remand in that case resulted from the Secretary's failure to consider the cumulative effect of the claimant's impairments—a remand, in the Secretary's present terminology, that would have somehow terminated the litigation because it was based on legal error. Therefore, under *Hudson*, a claimant who has won a remand based on legal error has not won a final decision.

¹³ The dissenters had no disagreement with the Court's explanation of the role of the district court and the procedures to be followed in actions brought under Section 405(g). See *id.* at 2261 (White, J., dissenting) ("the remand decision is not a 'final judgment,' nor is the agency decision after remand") (quoting H.R. Rep. No. 120, 99th Cong., 1st Sess. 19, reprinted in 1985 U.S. Code Cong. & Admin. News 132, 148).

¹⁴ Indeed, in 42 U.S.C. § 405(h) (1982), Congress limited review of Social Security cases under the Administrative Procedure Act. See *Califano v. Sanders*, 430 U.S. 99, 106 (1977).

The Secretary's assertion that it is "not the underlying claim for benefits . . . that the claimant has 'complained of'" (Br. at 20) is completely at odds with the Court's findings in *Hudson*. A litigant does not attain a final decision until the district court makes a conclusive determination whether the plaintiff will receive the relief sought by bringing the action. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. at 742. As the *Hudson* Court explained, a Social Security claimant has not prevailed in litigation or obtained a final judgment under Section 405(g) until after "the successful completion of the remand proceedings before the Secretary." *Sullivan v. Hudson*, 109 S. Ct. at 2255. Only then has the claimant achieved *any* of "the benefit sought in bringing the action." *Id.* (citing *Paulson v. Bowen*, 836 F.2d 1249, 1252 (9th Cir. 1988); *Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *Brown v. Sec'y of HHS*, 747 F.2d at 880-81).

Despite this precedent, the Secretary, apparently having grown to regret his concession in *Hudson* that a remand is *not* a "final determination of the civil action," see pp. 13-14, *supra*, now asks this Court to reverse course and hold that the district court proceedings are in fact largely distinct from proceedings conducted by the Secretary on remand. (Br. at 20). Although the Secretary attempts to distinguish the holding of *Sullivan v. Hudson* as one that "involved the award of attorney's fees under the Equal Access to Justice Act" (Br. at 25), he offers no explanation for his suggestion that, while a remand under Section 405(g) is not final under the EAJA, it is final under Section 1291. He cannot explain this contradictory assertion because the Court's decision in *Hudson* under the EAJA depended on its analysis of how and when a plaintiff prevails and achieves a final judgment in a case seeking review of a Social Security claim under Section 405(g).¹⁵ Adopting the Secretary's proposal

¹⁵ The Secretary's reliance on *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), to distinguish *Hudson* misses the mark. In *Budinich*, the Court held that the mere pendency of an at-

would require a reevaluation of the procedure for the processing of EAJA applications mandated by the Court in *Hudson*.

2. The Proper Construction of Section 405(g) Confirms That a Remand Is Not a Final Decision.

The proper reading of Section 405(g) confirms for four reasons that district court remands to the SSA are not final decisions: (a) remands derive from the district courts' equitable powers, and the fourth sentence neither grants authority to remand nor suggests that when a court remands it enters a final judgment; (b) the sixth sentence requires further proceedings in the district court following the Secretary's proceedings after any remand; (c) the eighth sentence provides for the application of ordinary rules of federal appellate jurisdiction, which uniformly hold that a remand order is not a final decision; and (d) the subsequent legislative history confirms this reading of the statute that a remand is not a final decision, and that no distinctions among remands should be made in determining appealability.

a. As this Court recognized last Term in *Hudson*, Section 405(g) made the district courts "ground-level" participants in Social Security claims cases and took them out of "their accustomed role as external overseers of the administrative process." *Sullivan v. Hudson*, 109 S. Ct. at 2254. It was well established at the time of the statute's passage in 1939 that the power to review agency action (expressly granted by the first sentence of Section 405(g)) carried with it equitable powers incident to review, including the power to remand for further administrative action. *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373-75 (1939); *Southern Ry. v. St. Louis Hay &*

torney's fee application does not *reopen* an otherwise final judgment, as would, for example, a motion to amend a judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure. In contrast, *Hudson* turned on whether the underlying district court decision to remand was final, so that an EAJA application could be made. The two situations are so different that in *Hudson* neither the majority nor the dissent found any need at all to address *Budinich*.

Grain Co., 214 U.S. 297, 302 (1909); see *Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980) ("an appellate court may *always* remand a case to the agency for further consideration" (emphasis added)).

In the absence of express statutory expansion of the courts' authority, the actions of the courts were restricted to validating or invalidating the agency decision or remanding for further action:

On the appeal the district court was not authorized to substitute for those of the commission its own views as to what action would be just or ought to be taken, or to perform any legislative, executive, or administrative function. . . .

The permissible scope of the determinations and judgment of the court is significant. It may only decide the questions of law raised by the appeal and affirm or reverse the order or remand the record to the commission for further action. It is without authority to amend or modify an order of the commission.

Public Service Comm'n v. Havemeyer, 296 U.S. 506, 517-18 (1936); accord *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144 (1940) (although the Radio Act of 1927 originally authorized the court of appeals to "alter or revise the decision [of the FCC] appealed from," the Act was amended in 1930 to limit the court's power to "affirming or reversing the decision of the commission," Pub. L. 71-494, 46 Stat. 844, 845); *Central Ky. Natural Gas Co. v. Railroad Comm'n*, 290 U.S. 264, 273 (1933) (court could invalidate commission's rate as confiscatory but had no authority to set rate it considered fair and just).

Only where the legislature had *expressly* expanded the court's reviewing power could a court enter a judgment as if the action had been originally brought and tried in the reviewing court. *E.g.*, *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 580 (1923) ("as the statute grants jurisdiction to make and enter . . . a decree affirming, modifying or setting aside an order, the court . . . has full

power under the statute" to decide the controversy without remanding).¹⁶

In Section 405(g), Congress accomplished this expansion of power particularly in the fourth sentence, which gave the district court the power—without a *de novo* trial ("upon the pleadings and transcript of the record")—to enter a judgment "affirming, modifying, or reversing" the Secretary's decision, whether or not the district court exercised its equitable power to remand ("with or without remanding").¹⁷ Contrary to the Secretary's unsup-

¹⁶ See 42 Am. Jur. *Public Administrative Law* § 246 at 688 (1936) ("Under the statutes, the power of the courts on review of an administrative determination is usually limited to affirming or setting aside the determination, and it is usually held that they have no power to amend or modify the determination. However, the statutes sometimes vest the court with such power.") (citations omitted); Stason, *Methods of Judicial Relief from Administrative Action*, 24 A.B.A.J. 274, 275-76 (1938) ("Some statutes give the courts the power not only to reverse and affirm, but also to modify, thus conferring power to enter decrees directly disposing of appealed cases. Others limit the court's power to reversal or affirmation."); accord Davis, *To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?*, 25 A.B.A.J. 770, 772 & n.31, 780 (1939).

¹⁷ As Irving Ladimer, an employee of the Social Security Board involved in the drafting of Section 405(g), explained in an article which appeared shortly after the 1939 amendments to the Social Security Act were passed, "[t]he provisions [for judicial review] are similar to those in other statutes" such as the Federal Trade Commission Act and the National Labor Relations Act. Ladimer, *Hearing and Review of Old-Age and Survivors Insurance Claims and Wage Record Cases by the Social Security Board*, 9 Geo. Wash. L. Rev. 58, 61 & n.12 (1940). These statutes provided a broader grant of reviewing authority than did the statutes providing for review of the ICC and the FCC. *FTC v. Curtis Publishing Co.*, 260 U.S. at 530 ("The language of the [FTC Act] is broad and confers power of review not found in the Interstate Commerce Act . . ."); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 144. Although the text of Section 405(g) and contemporaneous interpretation place it squarely in the group of statutes providing broader reviewing authority, it is the narrower statutes on which the Secretary primarily relies for the argument that only the "validity" of the agency's decision is ever at issue on review of

ported assertion that Section 405(g) "limits" the district court's authority (Br. at 16), the statute clearly granted additional reviewing powers without disturbing the already well-developed equitable power to remand for further action. Indeed, in *Califano v. Yamasaki*, 442 U.S. 682, 704-06 (1979), the Court rejected the Secretary's argument that Section 405(g) limits a district court's equitable powers and held that a district court in an action under Section 405(g) has the power to issue injunctions, despite the absence in the statute of an explicit grant of such power.

In this context, it is clear that a district court need not look to Section 405(g) for the authority to remand, and a remand need not, as the Secretary assumes, be "governed by" the fourth sentence or the sixth sentence. Indeed, as discussed above, the fourth sentence was meant to do more than merely define a type of remand, while the sixth sentence describes certain specific procedures applicable to remands. A plain reading confirms that neither sentence presumes to grant afresh the long-established power of reviewing courts to remand agency decisions.

b. The second clause of the sixth sentence sets forth a procedure "after the case is remanded" requiring the Secretary to return to the district court for further proceedings before a conclusive determination of the case is reached. According to the seventh sentence, the district court may then review the Secretary's "modified findings of fact and decision"

agency action. E.g., *Burlington N. Inc. v. United States*, 459 U.S. 131, 141 (1982) (construing the limited grant of jurisdiction to the court of appeals in 28 U.S.C. § 2349(a) (1982) to review ICC orders and make "a judgment determining the validity of, and enjoining . . . the order of the agency"); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 145; *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901). Moreover, none of these cases involved any issue of appealability or finality.

Clearly, the remand itself is not a final decision: it was intended that after any remand the Secretary would render another decision and would then return to the district court.¹⁸ Indeed, in *Brown v. Sec'y of HHS*, 747 F.2d at 884, the court of appeals expressly deferred to the Secretary's interpretation of this clause, agreeing that the Secretary must "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits" (emphasis in original). In fact, the Secretary concedes here that, even where the court has remanded "because it has found the Secretary's first decision denying benefits to have been unlawful, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court . . ." (Br. at 44 n.35 (emphasis added)). Such a filing can only be "appropriate" under statutory authority of the sixth and seventh sentences.¹⁹

¹⁸ The 1939 House and Senate Reports describe the remand mechanism of Section 405(g) by using the terms of the sixth sentence: "Provision is made for remanding of proceedings to the Board for further action, or for additional evidence." S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939) (emphasis added).

¹⁹ *Accord Guthrie v. Schweiker*, 718 F.2d 104, 106 (4th Cir. 1983); see also *Wilson v. Heckler*, 609 F. Supp. 120, 120 (W.D. Mo. 1985) ("The Secretary takes this language [in the second clause of the sixth sentence of Section 405(g)] to require her, in any remanded case, to file a supplemental transcript and obtain judicial review of her post-remand decision" (emphasis added)); Final Rule of the SSA Concerning ALJ Decisions on Remand, 54 Fed. Reg. 37,789, 37,791 (1989) ("Because courts in most instances retain jurisdiction of civil actions when they remand them to the Secretary, we cannot bar a person's right to return to that court.").

The Secretary observes (Br. 44-45 n.35) that the sixth sentence is similar to remand provisions in certain other statutes providing for judicial review of administrative decisions. However, he does not cite a single case under any of those statutes distinguishing among remands in the manner he suggests. Thus, any similarity Section 405(g) may have to other statutes undercuts, rather than supports, the Secretary's effort to distinguish "fourth sentence remands" from "sixth sentence remands."

c. The eighth sentence provides that "[t]he judgment of the [district] court shall be final *except that it shall be subject to review in the same manner as a judgment in other civil actions*" (emphasis added). In this sentence, Congress expressed its understanding that appeals from district court decisions under Section 405(g) would be treated like any other appeals. The phrase "the judgment of the court shall be final" does not, as the Secretary suggests (Br. at 18), dictate that "fourth sentence remands" must be appealable. The phrase simply assured that "a judgment rendered [by the reviewing court] will be a final and indisputable basis of action as between the [agency] and the defendant." *FPC v. Pacific Power & Light Co.*, 307 U.S. 156, 160 (1939) (quoting *ICC v. Baird*, 194 U.S. 25, 38 (1904)); see 2 Am. Jur. 2d *Administrative Law* § 768 (1962) ("Finality of Court Decision"). It was not always clear that simple agency action was "final" between the agency and the defendant. *Chicago R.I. & Pac. Ry. v. Schendel*, 270 U.S. 611, 622-23 (1926) (leaving open the question whether agency action can itself serve as *res judicata*); see generally Note, *Res Judicata in Administrative Law*, 49 Yale L.J. 1250 (1940) (exploring the conclusiveness of administrative determinations). This phrase in the eighth sentence therefore codified the principle, later articulated by this Court, that a court's decision reviewing agency action will operate as law of the case and *res judicata*. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-40 (1958). The plain language of the rest of the sentence suggests that, in determining *appealability* of district court orders under Section 405(g), the appellate courts should look to the appropriate jurisprudence under Sections 1291 and 1292.²⁰

The Secretary argues that because the fourth sentence empowers the district court to enter a judgment "with

²⁰ Clearly, the eighth sentence dictates "when" review becomes available; the possibility that it might also accommodate different courts "where" review might be had (Br. at 19-20) is of no moment.

or without remanding," any remand must be a final judgment, and thus a final decision for purposes of Section 1291. (Br. at 17-18). This violates simple logic. The fact that the district court may enter a judgment under the fourth sentence that is or includes a remand does not mean that every remand must be a judgment, especially given the courts' equitable and statutory power to remand aside from the fourth sentence and without entering a judgment.²¹

d. Any ambiguity the Court might find in the statute may be resolved by subsequent legislative history. See *Seatrail Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). In 1978, the House Subcommittee on Social Security explained in a comprehensive review of the Social Security Act that no remand under Section 405(g) results in a final decision until the Secretary returns to the district court:

The district court shall remand a case to the Secretary if he so requests before he files an answer, or the court can on its own motion remand the case to the Secretary. The Secretary can modify or affirm a remanded decision, and file with the court any modified findings of fact and decision. The judgment of the court *shall then be final*, except that it shall be subject to review in the same manner as other

²¹ Examples of remands that accompany a judgment include those for the calculation of benefits or for certification for payment pursuant to 42 U.S.C. § 405(i) (1982).

Last Term in his Reply Brief on the merits in *Hudson* (at pp. 14-16), the Secretary advanced the same construction of the fourth, sixth and eighth sentences that he does here. The Court did not adopt it. There is no special language in the statute requiring the Court to consider a remand a "final judgment," let alone a final decision under Section 1291. If there were, the Court would have held remands to trigger immediately the thirty-day EAJA clock, and the continued proceedings in the SSA would have been held to be unrelated to the district court action. Moreover, not everything called a "judgment" is a final decision under Section 1291. A grant of partial summary judgment entered pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, for instance, is not an appealable final decision. Fed. R. Civ. P. 54(b).

civil actions, i.e. circuit court of appeals and Supreme Court.

Subcomm. on Social Security of the House Comm. on Ways & Means, WMCP No. 72, 95th Cong., 2d Sess., *The Social Security Amendments of 1977: Brief Summary of Major Provisions and Detailed Comparison With Prior Law* 26-27 (Comm. Print 1978) (emphasis added).

The Subcommittee on Social Security thus made no distinctions between "fourth sentence remands" and other remands. The 1980 amendment to Section 405(g) did not change this. In 1985, the House Judiciary Committee explained the application of the finality requirement in the EAJA to Section 405(g) cases in a similar manner:

[A]fter the HHS review upon remand the agency *must* file its findings with the reviewing court. *Thus the remand decision is not a "final judgment,"* nor is the agency decision after remand. Instead, the district court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts [the EAJA's] 30 days running.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 19, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 148 (emphasis added). These subsequent interpretations by Congress leave no doubt that a remand under Section 405(g) is not a final decision for purposes of appeal to the court of appeals.

In fact, adopting the Secretary's proposal to create an exception to Section 1291 by "interpreting" Section 405(g) would undermine clear congressional intent. If Congress had intended to distinguish between "fourth sentence remands" and "sixth sentence remands," making the former appealable, it could easily have done so. Although it did not do so here, Congress has explicitly provided for court of appeals jurisdiction over certain kinds of interlocutory district court orders in a number of statutes besides Section 1291.²²

²² *E.g.*, 28 U.S.C. § 1292 (appeal from certain interlocutory district court orders); 18 U.S.C. § 2518(10)(b) (1988) (appeals

The exceptions to finality afforded by Sections 1291 and 1292 are carefully crafted, and, as this Court has observed, Congress "has in those sections made ample provision for appeal of orders which are not 'final' so as to alleviate any possible hardship." *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. at 746. To interpret Section 405(g) as allowing interlocutory appeals in the face of Sections 1291 and 1292 would frustrate Congress' attempt to provide litigants only a limited ability to take interlocutory appeals. *Coopers & Lybrand v. Livesay*, 437 U.S. at 474.

3. Even if the Sentences of Section 405(g) May Be Read Separately, the District Court's Order Was a Remand Under the Sixth Sentence.

If the Secretary were correct—and he is not—that a remand must be categorized under either the fourth or sixth sentence of Section 405(g), the remand in this case was made pursuant to the sixth sentence. Even the Secretary would say that such a remand is not an appealable final decision.

The sixth sentence *by its terms* applies to the district court's remand in this case.²³ Indeed, the district court expressly remanded "for good cause shown" (Pet. App. 25a), a requirement that appears only in the sixth sentence. In remanding, the district court held that the Secretary must determine whether respondent has the ability to engage in "any gainful activity." Evidence bearing on that issue was not considered by the ALJ; thus, in sixth sentence terms, there was "new evidence" that had become "material." There was also "good cause for the failure to incorporate such evidence into the record" because such evidence was not considered relevant in the

by the United States from suppression orders in criminal cases); 18 U.S.C. § 3145(c) (1988) (appeals of bail determinations); Classified Information Procedures Act, 18 U.S.C. App. § 7 (1988).

²³ Nothing in the language of the sixth sentence supports the Secretary's limitation of its scope to "pure remand orders" (Br. at 23) (a term with which we are not familiar).

prior proceedings. The remand here was in accordance, for example, with *Bohms v. Gardner*, 381 F.2d at 286, where the court listed a number of reasons why the district court had "good cause" to remand, including that "an improper standard may have been applied by the hearing examiner"

The Secretary points to the 1980 amendment to the sixth sentence (Br. at 24-25 n.18), which addressed the Secretary's concern about situations where a claimant failed to present convincing medical evidence of disability to the ALJ but brought such evidence to the district court and moved for a remand. H.R. Rep. No. 100, 96th Cong., 2d Sess. 58, reprinted in 1980 U.S. Code Cong. & Admin. News 1277, 1336; see *Aubeuf v. Schweiker*, 649 F.2d 107, 115-16 & nn.16-18 (2d Cir. 1981). One need not conclude, as the Secretary does (Br. at 22), that the sentence as a whole only applies to "premerits" remands, simply because the sixth sentence was amended in part to address concerns raised by that particular type of remand. The House Report was very clear that the amendment did not alter "the provision of present law that gives the court discretionary authority to remand cases to the Secretary." 1980 U.S. Code Cong. & Admin. News at 1337. In fact, even after reaching the merits, courts continue to remand Social Security cases for the consideration of an additional factor under authority of the "good cause"/"new evidence" language in Section 405(g).²⁴

²⁴ E.g., *Carter v. Heckler*, 712 F.2d 137, 141 (5th Cir. 1983); *Aubeuf v. Schweiker*, 649 F.2d at 116; *Curtis v. Heckler*, 579 F. Supp. 1026, 1028-29 (E.D. Tex. 1984); see also *Reynolds v. Heckler*, 570 F. Supp. 1064, 1067 (D. Ariz. 1983) ("Good cause may be established . . . when it is shown the Secretary applied improper standards in reaching his decision"); D. Sweeney, J. Lyko & P. Martin, *Practice Manual for Social Security Claims* 148-49 (1980 & Supp. 1983) (remands for "good cause" are frequently made "when the court finds that significant issues were not considered" and "when the claim was decided under an improper legal standard").

4. The Secretary's Proposal to Distinguish The Appealability of "Fourth Sentence Remands" From "Sixth Sentence Remands" Is Unsound in Terms of Administration of the Courts of Appeals.

The Secretary's proposal not only is completely inconsistent with *Hudson* and with the purposes of Section 405(g) and Section 1291, but also would generate unwarranted litigation and confusion in the lower courts. A rule requiring the courts to attempt to distinguish between "fourth sentence remands" and "sixth sentence remands" would result in a case-by-case inquiry of appealability as of right contrary to this Court's teachings that such inquiries are to be avoided. See *Osterneck v. Ernst & Whinney*, 109 S. Ct. 987, 992 & n.3 (1989); *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 202.

Rather than providing "operational consistency," *id.*, the Secretary's rule would generate a flood of litigation about whether each remand was a "fourth sentence remand" and thus immediately appealable under Section 1291, or a "sixth sentence remand" and not immediately reviewable.²⁵ Indeed, under the Secretary's proposal both the claimant and the Secretary would often be compelled to appeal immediately at the time of any remand, for fear that failure to take an immediate appeal where permitted might waive the right to have review of the is-

²⁵ Since 1984, remands have comprised between 43% and 63% of district court dispositions of the roughly 8,000 to 28,000 Social Security cases filed each year:

Fiscal Year	Dispositions	Remands (% of Dispositions)	
1984	19,475	11,993	(61%)
1985	27,858	17,711	(63%)
1986	21,259	12,602	(59%)
1987	11,124	4,739	(43%)
1988	14,785	7,139	(49%)
1989	12,005	5,389	(45%)

See Div. of App. Assessment of the Off. of Policy & Procedures, SSA Off. of Hearings & Apps., *Court Remands: Analysis and Recommendations* 4 (Dec. 1987); *Fiscal 1989 Report Table 3*; *Fiscal 1988 Report Table 3*.

sues decided. 28 U.S.C. § 2107 (1982); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 516 (1950) (appellant's "attempt to review the earlier decree by appealing from the later one is ineffective, and its appeal should be dismissed"); see *Copeland v. Bowen*, 861 F.2d at 538-39 ("[t]he Secretary argues that this appeal is untimely" because the remand order was immediately appealable).²⁶ Remands would thus be appealed, and their appealability litigated, whenever there was any basis for a difference of opinion as to the type of remand.²⁷ Moreover, treating remands as final for purposes of appealability would create a peculiar conflict with the timing of EAJA applications, which under *Hudson* are deferred until after the conclusion of the proceedings on remand—an anomaly bound to result in confusion for claimants and the district courts as well.

²⁶ If the Secretary were correct that a remand is immediately appealable, his time to appeal the district court remand in *Kier v. Sullivan*, 888 F.2d at 245-46, would have lapsed during the course of the administrative proceedings on remand.

²⁷ This case is illustrative: the parties strongly disagree over the proper characterization of the remand; indeed, the Secretary himself does not quite know how to characterize a district court remand, such as the one in this case (Pet. App. 17a-18a), "to make explicit findings." (See Br. at 25 n.18). In light of this uncertainty, the Secretary's statement that he does not "perceive any risk" of many appeals (Br. at 39-40 n.31; see also Br. at 21 n.17), provides no reliable prediction of what will occur if he is permitted to appeal remand orders, particularly given the likelihood of expanded litigation over types of remands. Moreover, the Secretary's unusual assertion that claimants will not appeal, because they will prefer to rely on the extremely high rate at which the SSA reverses itself on remand, ignores the thousands of appeals that would have to be taken by claimants and the government *simply to preserve their rights*. It also turns the protection of sound administration of the judicial system into a matter of grace from the Department of Justice by its refusing to appeal.

II. AS THE COURT OF APPEALS HELD, THIS CASE DOES NOT WARRANT APPLICATION OF THE "NARROW EXCEPTION" TO THE FINAL JUDGMENT RULE FOR COLLATERAL ORDERS.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, this Court carved out a limited exception to the final judgment rule for a "small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action" In order that the exception remain a narrow one, this Court has repeatedly held that "[t]o be appealable as a final collateral order, the challenged order must constitute 'a complete, formal and, in the trial court, final rejection,' *Abney v. United States*, 431 U.S. 651, 659 (1977), of a claimed right 'where denial of immediate review would render impossible any review whatsoever,' *United States v. Ryan*, 402 U.S. 530, 533 (1971)." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 376. This Court has thus held that "to come within the collateral order doctrine of *Cohen*, the order must satisfy each of three conditions: it must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from a final judgment.'" *Van Cauwenberghe v. Biard*, 486 U.S. at 522 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. at 468).

These prerequisites to appellate jurisdiction are not, as the Secretary asserts (Br. at 37), mere "factors" or "indicia" to be considered in each case. The Court soundly rejected such an approach in *Coopers & Lybrand*, 437 U.S. at 477 n.30. In fact, the fallacy of the Secretary's position is demonstrated by his reliance on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 10-12, in support of his mistaken belief that something less than satisfaction of the three specific requirements of the collateral order doctrine can sustain an immediate interlocutory appeal under Section 1291. (Br. at 31-32). In that case, the Court first held that the general requirement of finality had been met:

the district court's stay order "amounts to a dismissal of the suit" since "the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court." 460 U.S. at 10 & n.11. The Court also found the collateral order doctrine applicable. The Court explicitly stated that all three *Coopers & Lybrand* prerequisites are "required to show finality under this exception" and expressly held that all three requirements had been met. *Id.* at 11-13 (emphasis added). See also *United States v. Hollywood Motor Car Co.*, 458 U.S. at 265 (discussed at p. 10, *supra*).

The *Coopers & Lybrand* requirements are fully applicable in the context of judicial review of administrative agency action. See, e.g., *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 246 (1980) (holding that an interlocutory action of the FTC could not be appealed because it was not a final decision or an appealable collateral order); *Occidental Petroleum Corp. v. SEC*, 873 F.2d at 328-32. Indeed, the decision in *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. at 597-84, another agency case, supports the conclusion that a district court remand to an administrative agency is not an appealable collateral order—or a final decision under the Secretary's first theory. In that case, the district court decided certain claims, remanded other claims to the Secretary of Commerce, and directed the entry of judgment on its decision as a "final judgment" under Rule 54(b) of the Federal Rules of Civil Procedure. This Court held that the district court's final judgment on the non-remanded claims was immediately appealable pursuant to Rule 54(b). As the Court explained, "Rule 54(b) may properly be applied *only* to actions in which there has been a final decision on one or more *but fewer than all* multiple claims raised. This condition is *fully* satisfied here" *Id.* at 583 n.21 (emphasis added). Clearly, the decision on the remanded claims was not considered final.²⁸

²⁸ The Secretary's reliance (Br. at 29-30) on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *ICC v.*

The Secretary seeks to avoid the application of the final judgment rule based on his characterization of the right he seeks to protect as the right to avoid a remand in every administrative proceeding, simply because a

Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1987), for the proposition that the Hobbs Act provides an apt analogy is misguided. Those cases shed no light on the appellate scheme set forth in Sections 1291 and 1292; nor, in those cases, did the Court discuss whether its own jurisdiction was founded on the specific jurisdictional grant in the Hobbs Act in 28 U.S.C. § 2350 (1982), or on the general grant of certiorari jurisdiction in 28 U.S.C. § 1254(1) (1982), or on both. Section 2350 provides that a "final judgment of the court of appeals in a proceeding to review under this chapter [is] subject to review by the Supreme Court on a writ of certiorari as provided by Section 1254(1) . . ." (emphasis added). Section 1254(1), of course, permits review of court of appeals cases in this Court "before or after rendition of judgment."

Moreover, the Secretary's attempt (Br. at 30, 32 n.26) to analogize court of appeals jurisdiction under Section 1291 ("final decisions") to several of this Court's jurisdictional statutes ("final judgments") (28 U.S.C. § 2350 (Hobbs Act); 28 U.S.C. § 1257 (1982); and 15 U.S.C. § 29 (1988) (Expediting Act; see *Brown Shoe Co. v. United States*, 370 U.S. 294, 304-11 (1962)) is unavailing for reasons succinctly pointed out by Professor David L. Shapiro in his chapter on appellate jurisdiction in P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts & the Federal System* (3d ed., 1988) xxiii, 1794-1798 ("*Hart & Wechsler*"); see also 15 C. Wright, et al., *Federal Practice & Procedure*, § 3908 (1976 & Supp. 1990). The Secretary's assertion that the words "final decision" encompass more than the words "final judgment" has been recognized by the Court as erroneous for over one hundred years. *In re Tiffany*, 252 U.S. 32, 36 (1920); *Crawford v. Haller*, 111 U.S. 796, 797 (1884) ("The use of the term 'final decisions' . . . does not enlarge the scope of the jurisdiction of this Court. It is only a substitute for the words 'final judgments and decrees' . . . and means the same thing."). Professor Shapiro, in fact, has suggested various bases for interpreting "decision" in Section 1291 more narrowly than "judgment" in Section 1257, *Hart & Wechsler* at 1812, including the availability of review of interlocutory orders under statutory authority of Section 1292. Professor Shapiro highlighted "[t]he relative difficulties for a court in administering a flexible standard governing its own appellate jurisdiction

remand compels affirmative conduct by an officer of the executive branch. He argues that "[d]ue respect for a coordinate Branch" requires the immediate right of appellate review because the district court has "'directed' the Secretary to conduct further proceedings . . ." (Br. at 33 & n.27). He offers no reason why "due respect" requires an interlocutory round of judicial proceedings. His suggestion is refuted by the Court's finding in *Hudson* that Section 405(g) contemplates an unusual "degree of direct interaction" between the district courts and the SSA, in which the district courts are "'coparticipants in the [administrative] process, exercising ground-level discretion . . .'" 109 S. Ct. at 2254; see pp. 17-28, *supra*. Moreover, the Secretary's theory is undercut by his concessions that certain remands for the conduct of further proceedings under Section 405(g) are not immediately appealable. (Br. at 15, 23). In those situations, the Secretary agrees that he must abide by the district court's order and is not aggrieved by conducting further proceedings before taking an appeal. There is thus no theoretical basis for treating other, unspecified remand orders as raising special concerns requiring immediate resort to the courts of appeals.²⁹

(§ 1257), and in supervising the administration of a standard governing the appellate jurisdiction of thirteen lower courts (§ 1291)." *Id.* While this Court has nearly complete discretion to control its own docket, the courts of appeals—which are subject to mandatory jurisdiction under Section 1291 ("all final decisions")—continue to be, as Justice Scalia has observed, "sorely in need of further limiting principles . . ." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. at 292 (concurring opinion).

²⁹ The Secretary alternatively makes the rather unusual assertion that the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (1982) because the remand order "had the effect of an injunction." (Br. at 33-34 n.27). That novel theory was not timely pressed in or considered by the court of appeals, and this Court should not, therefore, reach the issue. See *Sullivan v. Everhart*, 110 S. Ct. 960, 967-68 (1990).

The argument also may be rejected out of hand for seven reasons. First, neither the district court nor the parties treated the order as an injunction. See 16 C. Wright, et al., *Federal*

In this case, none of the *Coopers & Lybrand* requirements is met: the district court's remand order is reviewable after the remand hearing; and the order did not conclusively resolve "an important issue completely separate from the merits" 437 U.S. at 468.

A. The District Court's Remand Order Is Not "Effectively Unreviewable."

The Secretary already has numerous avenues of review of a district court remand order. The district court's order in this case may be reviewed whether or

Practice & Procedure § 3922 at 24 (Supp. 1990). Second, the district court's remand order in this case did not, as required under Section 1292(a)(1), "give or aid in giving some or all of the substantive relief sought by [the] complaint" *International Prods. Corp. v. Koons*, 325 F.2d 403, 406 (2d Cir. 1963) (Friendly, J.); accord *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Sullivan v. Hudson*, 109 S. Ct. at 2255 (Social Security claimant who has won remand has not "achieve[d] [any] of the benefit sought in bringing the action"); see 16 C. Wright, et al., *Federal Practice & Procedure* § 3922 at 24 (Supp. 1990) ("Appeal should not be available merely because [a government] official has been directed to consider further a potential action."). Third, the Secretary mistakenly relies on a single case, *Avery v. Sec'y of HHS*, 762 F.2d 158, 160-61 (1st Cir. 1985), which expressly declined even to consider whether a remand order was an injunction. Fourth, the mere fact that the order requires some affirmative action does not make it an injunction. *United States v. Ryan*, 402 U.S. at 534. Fifth, the notion that the district court "ordered further proceedings in a different forum" (Br. at 34 n.27) blithely ignores the holding of this Court in *Sullivan v. Hudson*, 109 S. Ct. at 2254-55. See pp. 17-20, *supra*. Sixth, if a routine remand were an injunction, this Court would not have needed to decide in *Califano v. Yamasaki*, 442 U.S. at 705-06, that a district court has the power to issue injunctions in a Section 405(g) action. Finally, the Secretary does not even attempt to meet his burden of establishing the additional requirements necessary for immediate appellate review of orders having the "practical effect" of an injunction: "that the order will have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectively challenged' only by an immediate appeal." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. at 379 (citations omitted); see *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. at 287-88.

not the Secretary, after taking further evidence, grants Mrs. Finkelstein the benefits she seeks. As the Court explained in two opinions last Term, "an order is 'effectively unreviewable' only 'where the order at issue involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial."'" *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. at 1978 (emphasis added) (quoting *Midland Asphalt Corp. v. United States*, 109 S. Ct. at 1498, quoting, in turn, *United States v. MacDonald*, 435 U.S. 850, 860 (1978)).

1. The Secretary's Right to Appellate Review Is Not "Irretrievably Lost," Because the Claimant May Return to the District Court.

The Secretary argues that he "may not have an effective opportunity for appellate review" (Pet. at 16) because "[t]here can be no assurance" of appellate review. (Br. at 42) (emphasis added). The Secretary has the test backward. As this Court has held,

the final judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

Van Cauwenberghe v. Biard, 486 U.S. at 524 (emphasis added). The Secretary does not dispute the conclusion of the court of appeals that "'it is not inexorably so' that consideration of this issue will escape review." (Pet. App. 9a; 869 F.2d at 219). It is certainly possible that respondent will be dissatisfied with the Secretary's decision on remand and return to the district court. Following the district court's final decision, the Secretary would then have the opportunity to appeal all issues in the case, including those from the remand decision.

This is precisely what occurred in the Second Circuit in a recent widow's disability benefits case, *Kier v. Sullivan*, 888 F.2d at 245-46. After the Secretary denied

benefits, the claimant filed suit in the district court under Section 405(g). The district court reversed and remanded the case to the Secretary, holding that the ALJ's conclusion was not supported by substantial evidence and that the Secretary must consider the functional impact of the claimant's impairment. The Secretary did not attempt to appeal that decision, but conducted the proceedings on remand. In those proceedings, the Secretary again denied benefits. The claimant again sought judicial review, and the district court reversed, holding that the claimant had no ability to "perform gainful activity." *Id.* at 246.

Only then did the Secretary appeal the district court's initial holding that the SSA must consider the functional impact of a widow's impairment. Although the court of appeals affirmed that initial holding, the Secretary was able to challenge the district court's initial remand order on appeal from the final judgment.

2. The Secretary May Return to the District Court Following His Decision on Remand.

In addition, the Secretary is in fact *assured* of appellate review: he may return to the district court after making his decision on remand whether he modifies or affirms his decision regarding the respondent's capacity to engage in any gainful activity. As discussed above—and in *Hudson*, 109 S. Ct. at 2254—the sixth and seventh sentences of Section 405(g) outline explicitly the procedures applicable after the case is remanded. The second clause of the sixth sentence of Section 405(g) states that "after the case is remanded," the "Secretary . . . shall file with the [district] court any such additional and modified findings of fact and decision, and a transcript" Under the seventh sentence, the additional or modified findings of fact and decision shall then be reviewable to the same extent as the original findings of fact and decision. The language of the statute provides the Secretary with the opportunity for effective appellate review after the conclusion of all the proceedings in the district court.

Despite this Court's case law, the Secretary in this case still responds only with the unsupported assertion that "nothing in Section 405(g) *requires* the Secretary," after a remand based on legal error in the Secretary's first decision, to file with the district court a new decision in favor of the claimant. (Br. at 45; Pet. at 17 n.10). It appears that the statute does require the Secretary's return to the district court, see pp. 23-24 & n.19, *supra*, and that the Secretary's argument contravenes the plain language ("shall file") and statutory purpose of Section 405(g), as well as his own prior interpretations. *Brown v. Sec'y of HHS*, 747 F.2d at 884 (court deferred to Secretary's assertion that, under the second clause of the sixth sentence, he will return to the district court following any remand).

In any event, the important fact under the *Coopers & Lybrand* test remains that the Secretary has statutory authority that *allows* him to appeal even if he grants benefits on remand.³⁰ There is no dispute that, following the award of benefits, the Secretary may file his decision with the district court and can then obtain a final judgment.³¹ Indeed, following an award of benefits, the

³⁰ In solitary "support" of his claim to the contrary (Br. at 42-43 n.33), the Secretary cites the irrelevant testimony of Harold Packer, an SSA official, twenty years after Section 405(g) was enacted. That testimony concerns *initial* appeals of the decision of the SSA, and does not even address the issue in this case—when the SSA may *return* to the district court following a remand.

³¹ We fail to understand how the Secretary can refer to this practice as "novel and awkward" (Br. at 45) since he has frequently engaged in it and has conceded that it is the proper approach under Section 405(g). (Br. at 44 n.35). *E.g.*, *Sullivan v. Hudson*, 109 S. Ct. at 2252 ("The district court, pursuant to the Secretary's motion, dismissed respondent's action . . ."); *Papazian v. Bowen*, 856 F.2d 1455, 1455 (9th Cir. 1988) ("The Appeals Council's decision [on remand] was adopted by the district court, which entered a 'final judgment,' . . . prepared by the Office of the United States Attorney . . ."); *Miles v. Bowen*, 632 F.Supp. 282, 283 (M.D. Ala. 1986) (Secretary moved to affirm his decision granting benefits). Indeed, at least one district court has *required* the Secretary in all cases to file a notice of any favorable

claimant will generally seek fees pursuant to the EAJA. There will thus be proceedings of substance in the district court following the award of benefits, since the claimant's application will require analysis of whether the Secretary's position was "substantially justified." After the district court's final judgment is entered, the Secretary can appeal the decision, including the adverse remand order—a procedure that has been held to be appropriate in the Social Security context.³²

B. The District Court's Remand Order Did Not Resolve "An Important Issue Completely Separate From the Merits of the Action."

The requirement set out in the second part of the test articulated by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. at 468—that the order must resolve "an important issue completely separate from the merits"—also defeats the use of the collateral order doctrine in this case. First, the district court's order did not resolve an "important issue." Second, the district court's order is intertwined with the ultimate resolution of respondent's claim for benefits. Indeed, the Secretary conceded in his petition that the remand is not "completely separate from the merits of the action" but urged the Court to disregard this defect. (Pet. at 16 n.9).³³

decision following remand along with the record of proceedings in the case. *Lenz v. Sec'y of HHS*, 641 F. Supp. 144, 145-46 (D.N.H. 1986).

³² *Barfield v. Weinberger*, 485 F.2d at 698 (holding that Secretary may not appeal remand immediately but must wait until after remand); see *Kier v. Sullivan*, 888 F.2d at 245-47; *Hatcher v. Sec'y of HHS*, No. 88-2918, slip op. at 7 (claimant's appeal of district court's remand order properly taken after new decision by Secretary and affirmance by district court of Secretary's decision); *Copeland v. Bowen*, 861 F.2d at 539 (same); cf. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980) (allowing prevailing party to appeal adverse interlocutory order following final judgment).

³³ Moreover, the first part of the *Coopers & Lybrand* test has not been met because the district court did not conclusively re-

1. The District Court Did Not Resolve an "Important Issue."

The district court here simply remanded the case for the Secretary to make the actual, individualized, factual determination whether Mrs. Finkelstein is able to engage in "any gainful activity"—the ultimate determination required by the statute. (Pet. App. 18a).³⁴ The Secretary's bald assertion that the district court's order "may have seriously adverse consequences for the agency and the public" (Br. at 27) should not be countenanced by this Court. The remand had, according to longstanding SSA policy, no further reach than respondent's particular application for benefits: the SSA does not consider district court opinions to be binding in the adjudication of future cases or in the administration of other claims.³⁵ Profes-

solve the issue: there is nothing to prevent the district court from reconsidering its prior decision following a return to the district court by either party, see *Messinger v. Anderson*, 225 U.S. 436, 444 (1912), especially since the district court reached its decision without briefing by the parties on the functional impact issue. See 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1] at 120-21 (2d ed. 1988) (law of the case doctrine applies where parties have had opportunity to brief the relevant issues).

³⁴ The Secretary misleadingly asserts again and again that the district court's order resolved an important issue by invalidating the Secretary's longstanding regulations, implicitly on a nationwide basis. (Br. at 4-5, 13, 38 & n.29). An examination of the district court's opinion and order, however, reveals no such invalidation. Neither party asked the district court to rule on the validity of the regulations, and neither the district court nor the court of appeals referred to any invalidation of regulations. See *Cassas v. Sec'y of HHS*, 893 F.2d at 458 (decision that Secretary must consider functional impact in widow's disability case does not necessarily "attack the facial validity" of the regulations). Indeed, in remanding for consideration of the functional impact of Mrs. Finkelstein's heart disease, there was no need for the district court to invalidate the widow's benefits regulations, since they are silent on the terms functional impact and residual functional capacity. 20 C.F.R. §§ 404.1577, 404.1578.

³⁵ Decisions by the district courts containing "interpretations of the law, regulations, or rulings which are inconsistent with the Secretary's interpretations" have never been considered by the

sor Wright's criticism of the court of appeals' decision in *Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd sub nom. Richardson v. Perales*, 402 U.S. 389 (1971), is thus particularly penetrating when directed to appeals by the Secretary: "[t]he interest of an institutional litigant in settling questions of law is apparent, but it seems a slender reed for immediate appeal." 15 C. Wright, *et al.*, *Federal Practice & Procedure* § 3914 at 551-52 n.43 (1976).³⁶

As Justice Scalia observed last Term, "[t]he importance of the right asserted has always been a significant part of our collateral order doctrine." *Lauro Lines S.R.L. v. Chasser*, 109 S. Ct. at 1980 (concurring opinion). The rights this Court has held to be sufficiently important to allow an immediate appeal are far graver

ALJs as "binding on future cases simply because the case is not appealed" to the court of appeals. J. Mashaw, *et al.*, *Social Security Hearings & Appeals* 141; see Kubitschek, *A Re-Evaluation of Mathews v. Eldridge in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 Ariz. L. Rev. 53, 60-61 & nn. 48-50 (1989).

³⁶ The Secretary's reliance (Br. at 27-30) on *Richardson v. Perales*, 402 U.S. 389 (1971), *rev'd Cohen v. Perales*, 412 F.2d 44, 48 (5th Cir. 1969), is misplaced for three reasons. First, this Court reversed the decision of the Fifth Circuit without reaching the jurisdictional issue decided by the court of appeals; the issue was not briefed in this Court by either side and apparently was not considered by the Court. Second, the *Perales* court of appeals did not have the benefit of this Court's recent finality jurisprudence (including *Hudson* and *Coopers & Lybrand* and its progeny), which has developed considerably in the two decades since that case was decided. See pp. 9-10 & nn. 4-6, *supra*. Indeed, the continued vitality of the jurisdictional decision of the court of appeals in *Perales* is questionable even within the Fifth and Eleventh Circuits. See *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (en banc), *cert. denied*, 469 U.S. 818 (1984); *Taylor v. Heckler*, 778 F.2d 674, 677 (11th Cir. 1985) ("This circuit treats all remand orders to the Secretary as interlocutory orders, not as final judgments" (emphasis in original)). Finally, the court of appeals in *Perales* noted that the exact situation presented by this case—"an order *sua sponte* by the court for the taking of additional evidence"—is *not* immediately appealable. 412 F.2d at 48.

than the right the Secretary seeks to protect here. For example, the right not to stand trial based on the Double Jeopardy Clause's guarantee that trial *will not occur* twice for the same offense is such a right, *Abney v. United States*, 431 U.S. at 659, as are the rights of the President of the United States and the Attorney General not to stand trial based on claims of official immunity from suit, *Nixon v. Fitzgerald*, 457 U.S. at 742-43, *Mitchell v. Forsyth*, 472 U.S. at 530. Surely, the right not to hold a hearing on remand in this single case does not rise to that level of importance.³⁷

2. The Issue Is Not "Completely Separate From the Merits."

The requirement that the district court order must have resolved an important issue "completely separate from the merits of the action" derives from the principle that there should not be piecemeal review of "steps towards final judgment . . ." *Cohen v. Beneficial*, 337 U.S. at 546. Yet a remand (particularly in a Social Security case) is nothing but a step "towards final judgment," *id.*, entwined with the merits of the action.

In determining whether to remand in a Social Security case, the district court examines the factual record and applicable legal principles, as it did in this case. As the

³⁷ The Secretary relies on several articles that supposedly "furnish instructive accounts of the adverse consequences" of the Federal Circuit's refusal to allow the Department of Commerce to appeal immediately remand orders by the Court of International Trade. (Br. at 39 n.30). Those consequences, however, flowed in large part from the fact that the Department of Commerce orders in question are reviewed in only one court of first instance, the decisions of which are reviewed in only one court of appeals. Moreover, the commentaries by Horgan, 3 Fla. Int'l L.J. 187, 202-04 (1988), and by Layton, 3 Fla. Int'l L.J. 167, 177 (1988), recognize that the best approach for the Department of Commerce would be to adopt the suggestion of the Federal Circuit and seek certification under 28 U.S.C. § 1292(d)(1) (1982), the parallel of Section 1292(b), while the third commentary seems unaware of the existence of Section 1292(d)(1), Hunter & McInerney, 3 Fla. Int'l L.J. 151, 158 n.39 (1988).

Court explained in *Sullivan v. Hudson*, 109 S. Ct. at 2254:

Where a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court's remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed.

There is generally substantial overlap between the factual and legal issues to be decided in the district court prior to remand and the issues that ultimately must be resolved in determining entitlement to benefits.³⁸ In contrast, orders that are "completely separate from the merits" involve no inquiry into the factual or legal issues whose resolution forms the basis of the final decision. *E.g.*, *Cohen v. Beneficial*, 337 U.S. at 546 (the need to post a bond is completely separate from merits of action); *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (amount of bail is "entirely independent of the issues to be tried").

III. NO INSTITUTIONAL INTERESTS WOULD BE SERVED BY DISREGARDING THE RULE OF FINALITY IN THIS CASE.

The Secretary claims that institutional efficiency would be served by his proposed rule because a rule of non-appealability "also would impose an unwarranted burden" on the SSA, which would be required "to conduct additional proceedings that are both unnecessary and wasteful of scarce resources" (Br. at 38). That is

³⁸ See *Harper v. Bowen*, 854 F.2d at 679, 682 (remand because of ALJ's improper application of legal standard "inextricably entwined with the merits"); *Farr v. Heckler*, 729 F.2d at 1427 ("The [district] court's affirmance of the ALJ's categorization of Farr's [residual functional capacity] as sedentary is intertwined with the merits."); *Tookes v. Harris*, 699 F.2d at 529 ("A review of the remand order is intertwined with a review of the merits."). Here, the district court's order required further consideration of the evidence before a final determination of the ultimate factual issue could be made. Unlike, for example, the need to post a bond, the inquiry into the functional impact of a claimant's impairment relates directly to the merits of the application for benefits.

astounding. Under SSA policy, the district court order affected *only* respondent's application in this case. While the finality rule often requires litigants to endure long trials following classic interlocutory orders (*e.g.*, motions to dismiss indictments, summary judgment motions, motions to dismiss in civil actions), an administrative hearing on remand requires no more than *a few hours* of an ALJ's time.³⁹ Moreover, the Secretary's position that his rule would promote efficiency is wrong. Indeed, his rule would unduly burden the courts, the claimants, and the SSA itself.

A. The Secretary's Proposal Would Improperly Burden the Courts.

The practical result of adopting the Secretary's position would be to make appellate review of district court remands to all administrative agencies routine, imposing a heavy burden on circuit judges, "who—more than any other segment of the federal judiciary—are struggling desperately to keep afloat in the flood of federal litigation." *Board of Trustees v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J., dissenting). Accordingly, this Court should, as Professor Wright and his colleagues suggest, "guard against continuing expansion of the claims that provide routine access to collateral order appeal." 15 C. Wright, *et al.*, *Federal Practice & Procedure* § 3911 at 165 (Supp. 1990).⁴⁰

Every year, the SSA receives thousands of remands, generally comprising approximately half of all district

³⁹ ALJs disposed of an average of 36 hearings each per month in fiscal 1988, expected to increase to 37 in fiscal 1989. Thus, on average, an ALJ disposes of 432 to 444 hearings annually. Based on a (generous) 2,000 hour work year, an ALJ would spend about four and a half hours on a hearing. SSA, *1989 Annual Report* at 33. The transcript of the hearing before the ALJ in this case, for instance, comprises only 33 pages.

⁴⁰ As Professor Wright explained, "[d]ouble jeopardy claims permit routine appeal and appeals have proliferated. Denial of motions to disqualify opposing counsel once permitted routine appeals, appeals multiplied riotously, and the rule had to be changed." *Id.*

court dispositions of Social Security cases. See p. 30 n.25, *supra*, and reports cited therein. The Secretary's proposal would effectively double the number of Social Security cases eligible for appellate review. The Secretary's contention that this decision implicates interests "far beyond the Social Security disability program" (Br. at 39) is true only if the Court adopts his proposal: because of the specific nature of district court review under Section 405(g), a finding that this order is not appealable does not necessarily implicate orders involving other agencies. On the other hand, the burden on the court system imposed by adopting the Secretary's proposal could be far greater than the thousands of SSA cases remanded annually, enabling agency after agency to take interlocutory appeals at will, and requiring litigants to appeal remand orders to preserve their rights.

B. The Secretary's Proposal Would Unfairly Burden Claimants.

The burden of appellate review falls squarely on Social Security claimants. Thousands of claimants are already caused tremendous hardship by the multiple levels of review needed to secure the benefits they should have received in the first instance.⁴¹ According to the Government Accounting Office, disability claimants must wait, on average, more than a year before an ALJ makes an initial decision on their claims. U.S. Gen. Accounting Office, *Social Security: Selective Face-to-Face Interviews With Disability Claimants Could Reduce Appeals* 13, Table 1.2 (GAO/HRD-89-22 April 1989). For those claimants who then proceed to the district court—their fifth level of proceedings—the average length of time between their initial application and the completion of proceedings following a district court remand is close to four years. *Id.*

⁴¹ A disappointed claimant for widow's benefits is subjected to four levels of administrative proceedings: consideration and reconsideration by a state agency (20 C.F.R. §§ 404.905 (1989), 404.909(a)(1) (1989)); a hearing by an ALJ (42 U.S.C. § 405 (b)(1) (1982); 20 C.F.R. § 404.929 (1989)); and review by the Appeals Council (20 C.F.R. § 404.967 (1989)).

Because of the Secretary's appeal, Mrs. Finkelstein, who applied more than six years ago for benefits she had already been determined to deserve, has not even reached the remand stage. The burden imposed by such delay during appellate review is already unbearable.⁴² Remarkably, the Secretary asks this Court to inject yet a sixth level of routine proceedings into the Social Security process, adding, on average, more than a year to the resolution of thousands of claims.⁴³

C. Immediate Appellate Review Would Be Inefficient for the SSA.

The Secretary ignores the fact that he will be required to defend claimants' appeals of remand orders. If a remand order is final under Section 1291, all parties must immediately appeal or waive their rights to have appellate review. Thus, routine appealability would not ease any burden on the Social Security Administration. It would simply shift the Secretary's resources from deciding claims to litigating appeals, a far more burdensome task. The costs to the executive branch of litigating an appeal are indisputably higher than those of holding an administrative hearing on remand (the former requires dozens, perhaps hundreds of hours of preparation by Department of Justice and SSA employees, while the latter requires only a few hours of an ALJ's time). Those costs will be multiplied by the thousands of district court remands made every year because claimants and the Secretary will find it necessary to appeal immediately to preserve their rights. Efficiency can be better served

⁴² See Diller & Morawetz, *Intracircuit Nonacquiescence and a Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 Yale L.J. 801, 815-16 (1990); Kubitschek, 31 Ariz. L. Rev. at 67-72.

⁴³ The average civil case in the courts of appeals takes nearly eleven months from the filing of a notice of appeal to final disposition (Annual Report of the Director of the Administrative Office of United States Courts 156 (1988)); that must be added to the sixty days either party has to file its notice of appeal in a civil case in which the Secretary is a party (28 U.S.C. § 2107; Fed. R. App. P. 4(a)(1)).

by first holding the hearing on remand, after which, in many cases, the parties may be satisfied and neither may wish to have further contested proceedings in the district court.

IV. THE SECRETARY HAS AN ADEQUATE ABILITY TO OBTAIN REVIEW OF ISSUES HE DEEMS IMPORTANT.

The Secretary has a number of ways to obtain appellate consideration of issues he considers important. First, as set forth above (see pp. 37-40, *supra*), after a district court remand, the Secretary or the claimant may return to the district court for further proceedings; an appeal may then be taken and plenary consideration obtained of the issue that initially prompted the remand. Moreover, the 10,000 to 30,000 cases appealed from the SSA annually ensure the Secretary's ability to raise important issues in the appropriate procedural posture. Indeed, the issue underlying this very appeal—whether the Secretary must consider the functional impact of a widow's impairment—provides a perfect example of this point: appellate consideration of the issue did not depend on a holding in this case that remands are appealable. The court of appeals in this case correctly predicted that other opportunities would arise for appellate consideration of this issue. (Pet. App. 11a-12a; 869 F.2d at 220). Recently, both the First and Second Circuits have given plenary consideration to this precise issue and held that the Secretary must consider the impairment's functional impact. *Cassas v. Sec'y of HHS*, 893 F.2d at 457-59; *Kier v. Sullivan*, 888 F.2d at 245-47. This issue is also *sub judice* in the Tenth Circuit in *Mesa v. Sec'y of HHS*, No. 89-2024 (app. filed January 25, 1989); and the Fourth Circuit in *Bennett v. Sullivan*, No. 89-1748 (March 16, 1990), has recently requested briefing to address the application to widow's benefits of *Sullivan v. Zebley*, 110 S. Ct. 885 (1990) (functional impact analysis applied to children's disability claims). Numerous

district court decisions—in a posture ripe for appellate review—have also decided this issue.⁴⁴

In addition, the availability of certification under Section 1292(b) and mandamus under Section 1651 for review of remands to administrative agencies in appropriate cases provides sufficient relief for the Secretary without requiring this Court to create a new rule of appellate jurisdiction.⁴⁵ As the Court explained in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. at 378 n.13, that availability further supports the court of appeals' conclusion that it had no appellate jurisdiction:

[I]t is not necessary . . . to create a general rule permitting the appeal of all such orders. . . . Ultimately, if dissatisfied with the result in the district court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b) . . . and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available.⁴⁶

⁴⁴ *E.g.*, *Rizzo v. Sec'y of HHS*, 708 F. Supp. 520, 522-23 (W.D.N.Y. 1989); *Brown v. Sullivan*, 724 F. Supp. 76, 77 (W.D.N.Y. 1989) (Secretary's decision was reversed and remanded "solely for the computation of benefits"); *Headlee v. Heckler*, 708 F. Supp. 1167, 1171 (D. Colo. 1987) (same), *EAJA award aff'd*, 869 F.2d 548, 552 (10th Cir.), *cert. denied*, 110 S. Ct. 507 (1989); *Hamby v. Heckler*, 607 F. Supp. 331, 335 (W.D.N.C. 1985). When the Secretary purported to appeal this case, he was at the same time considering whether to appeal three district court decisions in other circuits raising the same controversy. (Brief for Appellant at 9 (filed 6/6/88)).

⁴⁵ *E.g.*, *Colon v. Sec'y of HHS*, 877 F.2d at 151 (finding mandamus jurisdiction under All Writs Act); *McCoy v. Schweiker*, 683 F.2d 1138, 1141 n.2 (8th Cir. 1982) (en banc) (taking jurisdiction under Section 1292(b)); *Torres v. Sec'y of HHS*, 677 F.2d 167, 168 (1st Cir. 1982) (same).

⁴⁶ *Accord Van Cauwenberghe v. Biard*, 486 U.S. at 529-30; *Tookes v. Harris*, 699 F.2d at 529 ("The 'safety valve' in 28 U.S.C. § 1292(b) . . . cushions any injustice which might result from the final-judgment rule."); *Bachowski v. Usery*, 545 F.2d 363,

As Professor Wright predicted, the passage of Section 1292(b) "may make it appropriate to curtail further growth of hardship and collateral order appeals under § 1291. Section 1292(b) appeals may be better controlled, and do not raise any danger that failure to seek or perfect an appeal will destroy the right to later review." 16 C. Wright, *et al.*, *Federal Practice & Procedure* § 3929 at 146-47 (1977). In the years since Professor Wright's observation, this Court has consistently restricted the availability of immediate appeal before final judgment.

CONCLUSION

For the reasons discussed above, the decision of the court of appeals should be affirmed.

Respectfully submitted,

KENNETH V. HANDAL
Counsel of Record

DENNIS G. LYONS
MARY G. SPRAGUE
KENT A. YALOWITZ

ARNOLD & PORTER
Park Avenue Tower
65 East 55th Street
New York, N.Y. 10022
(212) 750-5050

JOHN E. BIGGIANI
Of Counsel

Counsel for Respondent

April 9, 1990

371 (3d Cir. 1976); *Harper v. Bowen*, 854 F.2d at 680 (appeal dismissed; Secretary should have petitioned district court for Section 1292(b) certification); *Barfield v. Weinberger*, 485 F.2d at 697 (same); *cf. Badger-Powhatan v. United States*, 808 F.2d 823, 826 (Fed. Cir. 1986) (same, in appeal by Dep't of Commerce, with respect to Section 1292(d)(1)); *Cabot Corp. v. United States*, 788 F.2d 1539 (Fed. Cir. 1986) (same); *see also McCoy v. Schweiker*, 683 F.2d at 1141 n.2 ("Absent [Section 1292(b)] certification, there would be no appellate jurisdiction in this court.").